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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 387

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

vs.

C. W. VOLLMER & COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 5, 1954

CERTIORARI GRANTED NOVEMBER 22, 1954

United States Court of Appeals, Fifth Circuit

No. 14749

MAURICE J. TOBIN, Secretary of Labor, United States Department of Labor, APPELLANT,

vs.

C. W. VOLLMER & COMPANY, INC., a Corporation, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

IN THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

No. 14749

MARTIN P. DURKIN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT,

versus

C. W. VOLLMER & COMPANY, INC., APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

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1

United States District Court
Eastern District of Louisiana, New Orleans Division

No. 3280 (Civil Action)

MAURICE J. TOBIN, Secretary of Labor, United States Department of Labor, PLAINTIFF,

vs.

C. W. VOLLMER & COMPANY, INC., a Corporation, DEFENDANT.

APPEARANCES:

Messrs. Earl Street, Regional Attorney, William S. Tyson, John J. Babé, T. Hagan Allin and Harry Campbell, Attorneys for Plaintiff-Appellant.

Messrs. Deutsch, Kerrigan and Stiles, and Robert E. Leake, Jr., Attorneys for Defendant-Appellee.

APPEAL from the United States District Court for the Eastern District of Louisiana, to the United States Court of Appeals for the Fifth Circuit, returnable within forty (40) days from the 2nd day of September, 1953, at the City of New Orleans, Louisiana.

2 COMPLAINT—filed December 5, 1951

(Number and Title omitted)

I

Plaintiff brings this action to enjoin defendant from violating the provisions of Section 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; U. S. C. Title 29, Sec. 201 *et seq.*), hereinafter called the Act.

II

Jurisdiction of the action is conferred upon the court by Section 17 of the Act.

III

The defendant, C. W. Vollmer and Company, Inc., is, and at all times hereinafter mentioned was, a corporation

organized under and existing by virtue of the laws of the State of Texas, having its principal office and place of business at 609 Cotton Exchange Building, Houston, Harris County, Texas. The defendant corporation is doing business in the State of Louisiana and maintains an office near Algiers, Louisiana, at which place service may be had upon Mr. C. W. Vollmer, President, within the jurisdiction of this court.

IV

At all times hereinafter mentioned, defendant employed and is employing in interstate commerce, within the meaning of the Act, approximately 85 employees in and about its place of business in and in the vicinity of Algiers, Orleans Parish, Louisiana, and elsewhere, in the enlargement, maintenance, repair, improvement, and extension, of instrumentalities of interstate commerce and in particular since about September, 1950, such employees have been, and are now, employed in the extension, enlargement, and improvement of the Gulf Intercoastal Canal and
3 Waterway, on and over which goods are regularly shipped and transported in interstate commerce, within the meaning of the Act.

V

Defendant repeatedly has violated and is violating the provisions of Section 7 and 15(a)(2) of the Act by employing many of its employees in interstate commerce, within the meaning of the Act, as aforesaid, for workweeks longer than 40 hours since September, 1950, without compensating these employees for their employment in excess of 40 hours, in workweeks during such period, at rates not less than one and one-half times the regular rate at which they were employed.

VI

On October 21, 1938, the Administrator of the Wage and Hour Division, United States Department of Labor, pursuant to the authority conferred upon him by Section 11(c) of the Act, duly issued and promulgated regulations prescribing the records of persons employed and of wages, hours, and other conditions and practices of employment to be made, kept, and preserved by every employer subject to any provision of the Act. The said regulations, and amendments thereto, were published in the Federal Register and are known as Title 29, Chapter V, Code of Federal Regulations, Part 516.

VII

Defendant, an employer subject to the provisions of the Act, repeatedly has violated and is violating the provisions of Sections 11(c) and 15(a)(5) of the Act, in that since September, 1950, it has failed to make, keep, and preserve adequate and accurate records of its employees and the wages, hours, and other conditions and practices of employment maintained by it, as prescribed by the said regulations in that the records kept by defendant failed to show adequately and accurately, among other things, the hours worked each workday and each workweek, the regular rate of pay, the basis upon which wages are paid, the total straight-time earnings for each workweek, and the total weekly overtime excess compensation with respect to many of its employees.

VIII

Defendant has, since the effective date thereof, repeatedly violated the aforesaid provisions of the Act. A judgment enjoining and restraining the violations hereinabove
4 alleged is specifically authorized by Section 17 of the Act.

Wherefore, cause having been shown, plaintiff demands judgment permanenty enjoining and restraining defendant, its agents, servants, employees, and all persons acting or claiming to act in its behalf and interest, from violating the provisions of Sections 15(a)(2) and 15(a)(5) of the Act, and such other and further relief as may be necessary and appropriate.

William S. Tyson,
Solicitor
John J. Babé,
Assistant Solicitor,
Earl Street,
Regional Attorney,
T. Hagan Allin,
Associate Attorney,
United States Department of Labor.

Post Office Address: Earl Street, Regional Attorney, Office of the Solicitor, Department of Labor, Room 222, Fidelity Bldg., Dallas, Texas or Office of the Solicitor, Department of Labor, Washington, D. C.

5 ANSWER—filed January 4, 1952

(Number and Title Omitted)

First Defense

This court is without jurisdiction of this cause in that none of defendant's operations described in the complaint was, or is, in interstate commerce or in the production of goods for interstate commerce, and none of defendant's employees was, or is, engaged in interstate commerce or in the production of goods for interstate commerce, within the purview of the Fair Labor Standards Act.

Second Defense

First

Defendant admits the truth of the averments of fact contained in paragraphs III and VI of the complaint.

Second

Defendant denies the truth of the averments of fact contained in paragraphs II, IV, VII and VIII of the complaint.

Third

The averments of paragraph I of the complaint are not averments of fact as to which responsive pleading is required or permitted, but, insofar as defendant is required to answer thereto, defendant denies the truth thereof.

Fourth

Defendant admits that since September, 1950, some of its employees at Algiers, Louisiana, worked in excess of forty (40) hours per week without being compensated for such excess at rates not less than one and one-half times their regular rate of pay, but denies the truth of the remaining averments of fact contained in paragraph V of the complaint.

6 WHEREFORE defendant prays that this suit be dismissed at complainant's cost.

ROBERT E. LEAKE, JR.,
of
DEUTSCH, KERRIGAN & STILES,
1700 Hibernia Bank Building,
New Orleans 12,
Attorneys for Defendant.

CERTIFICATE

I certify that copies of the foreging answer have been mailed to Honorable Earl Street, attorney for plaintiff, at his office, Room 222 Fidelity Building, Dallas, Texas, this 4th day of January, 1952.

ROBERT E. LEAKE JR.

7 INTERROGATORIES PROPOUNDED BY PLAINTIFF TO DEFENDANT--Filed SEPT. 2, 1952

(Number and Title Omitted)

Comes now Maurice J. Tobin, Secretary of Labor, United States Department of Labor, plaintiff above named, and serves the following interrogatories on the defendant above named under Rule 33, Federal Rules of Civil Procedure, to be answered in accordance with said rule within fifteen (15) days from the date of service:

I

(a) On what date did you begin work under construction contract No. 16-047-eng-796, which was awarded you by the Corps of Engineers, Department of the Army, and under the terms of which you contracted, according to the terms and specifications set out in such contract, to perform the work for construction of earth work and Emergency Dam Storage for Algiers Lock in Orleans Parish, Louisiana?

(b) Is work on the job set out in (a) above still in progress?

(c) If the answer to (b) above is No, state when the job was completed and when it was accepted by the Corps of Engineers, Department of the Army.

II

(a) State for each workweek, giving the beginning and ending dates of such workweeks, how many employees were employed in work on the project set out in Interrogatory I(a) above.

(b) How many of the employees mentioned in subsection (a) above worked in excess of 40 hours in each workweek?

(c) Were any of the employees mentioned in subsection (b) above paid additional compensation for hours worked in excess of 40 during the workweek at one and one-half times the regular rate of pay at which they were employed?

8

III

(a) List all construction projects upon which you have been or are now engaged, either as prime contractor or subcontractor, which were awarded either to you or your prime contractor by the Corps of Engineers, Department of the Army, for the period since January 1, 1948.

(b) In connection with subsection (a) above, state the nature of each such project in detail, giving the contract numbers, location, the work the contracts called for, dates work began and terminated and the number of employees employed thereon.

IV

(a) Were any of your employees employed on projects referred to in Interrogatory No. III above employed for workweeks longer than 40 hours during the period of their employment?

(b) If the answer to subsection (a) above is in the affirmative, state which projects and whether or not such employees were paid additional compensation for hours worked in excess of 40 during the workweek at one and one-half times the regular rate of pay at which they were employed.

V

State how long you have been engaged in the construction and contracting business.

WILLIAM S. TYSON,
Solicitor,
EARL STREET,
Regional Attorney,
T. HAGAN ALLIN,
Attorney,
United States Department of Labor.

Post Office Address: Earl Street, Regional Attorney, U. S. Department of Labor, 222 Fidelity Building, Dallas, Texas; or, Office of the Solicitor, U. S. Department of Labor, Washington 25, D. C.

T. Hagan Allin, one of the attorneys of record for the plaintiff, certifies that he served a full, true and correct copy of the within and foregoing Interrogatories upon Mr. Robert E. Leake, Jr., of the firm of Deutsch, Kerrigan & Stiles, attorneys for defendant, by placing a copy of the same in the United States mail in a franked envelope addressed to him at his last-known address at Hibernia Bank Building, New Orleans, Louisiana, on the 25th day of September, 1952.

T. HAGAN ALLIN.

9 OBJECTION OF DEFENDANT TO INTERROGATORIES NOS. III AND IV—Filed Filed Oct. 10, 1952

(Number and Title Omitted)

Defendant hereby objects to Interrogatories No. III and IV, all subsections, propounded to it by plaintiff on September 29, 1952, on the grounds that the information sought thereby neither is relevant nor could lead to relevant information in that the interrogatories make inquiry as to facts entirely outside the scope of the pleadings, and that same are unduly burdensome, in that they require detail examination of defendant's business records for a period in excess of four years.

WHEREFORE defendant moves the court for an order striking the interrogatories mentioned above and relieving it from the duty of answering them.

ROBERT E. LEAKE, JR., of
DEUTSCH, KERRIGAN & STILES,
1700 Hibernia Bank Bldg.,
New Orleans Bank Bldg.,
New Orleans 12,
Attorneys for Defendant.

NOTICE

To: Honorable Earl Street,
222 Fidelity Building,
Dallas, Texas,
Attorney for Plaintiff.

Please take notice that the foregoing objections to the interrogatories served in this cause by you on September 29, 1952, will be brought for hearing before the United States District Court at the United States Post Office Building, New Orleans, Louisiana, on Wednesday, October 22, 1952, at 11:00 o'clock AM, or as soon thereafter as counsel can be heard.

New Orleans, October 10, 1952.

ROBERT E. LEAKE, JR.

CERTIFICATE

I certify that two copies of the foregoing objections and notice thereof have been served on plaintiff by mailing same to his counsel, Honorable Earl Street, 222 Fidelity Building, Dallas, Texas, this 10th day of October, 1952.

ROBERT E. LEAKE, JR.

10 ANSWER OF DEFENDANT TO INTERROGATORIES PROPOUNDED BY PLAINTIFF—Filed Oct. 14, 1953

(Number and Title Omitted)

Now comes defendant, and makes the following answers to the interrogatories served on it by plaintiff on September 29, 1952.

TO THE FIRST INTERROGATORY:

(a) On or about September 10, 1950.

(b) Yes.

(c) No answer required.

TO THE SECOND INTERROGATORY:

For answer to this interrogatory, defendant annexes hereto photostatic copy of report giving the information requested.

Further answering sub-section (c), respondent answers that from September 10, 1950, to September 30, 1950, employees were paid one and one-half times their regular rate of pay for hours worked in excess of forty hours per week. From October 1, 1950, to November 3, 1951, employees were paid one and one-half times their regular rate of pay for hours worked in excess of eight hours per day, but not for hours worked in excess of forty hours per week. From November 4, 1951, to July 19, 1952, the job was idle, and since July 20, 1952, employees have been paid at one and one-half times their regular rate of pay for hours worked in excess of eight hours per day and in excess of forty hours per week.

TO THE THIRD AND FOURTH INTERROGATORIES:

Defendant heretofore has filed objections to these interrogatories.

TO THE FIFTH INTERROGATORY:

Since on or about January 2, 1947.

C. W. VOLLMER & CO., INC.,
By C. W. VOLLMER,
Pres.

11 STATE OF LOUISIANA,
PARISH OF ORLEANS:

Before me, the undersigned authority, personally came and appeared C. W. VOLLMER, who, after first being by me duly sworn, deposed:

That he is the duly elected and qualified president of C. W. Vollmer & Co., Inc., as such authorized to execute this affidavit; that he read the foregoing answers to interrogatories, and that the same are true.

C. W. VOLLMER.

Sworn to and subscribed before me this 14th day of October, 1952.

WILLIAM M. BENJAMIN,
[SEAL] *Notary Public, Parish of Orleans, State of La.*

My Commission is issued for life.

CERTIFICATE

I certify that two copies of the foregoing answers to interrogatories have been served on plaintiff by mailing same to Honorable Earl Street, counsel for plaintiff, at his office, 222 Fidelity Building, Dallas, Texas, this 14th day of October 1952.

ROBERT E. LEAKE, JR.

C. W. Vollmer & Co., Inc.
Earth Work and Emergency Dam Storage for Algiers Lock
Orleans Parish, Louisiana

Workweek		Number of Employees on Payroll	Number of Employees Worked in Excess of 40 Hours per week	Were any employees paid additional compensation for hours worked in excess of 40 per week, at one and one-half times the regular rate of pay?
Beginning	Ending			
9-10-50	9-16-50	19	0	
9-17-50	9-23-50	41	8	Yes
9-24-50	9-30-50	52	25	Yes
10- 1-50	10- 7-50	63	43	Yes
10- 8-50	10-14-50	73	55	Yes
10-15-50	10-21-50	61	11	Yes
10-22-50	10-28-50	70	46	Yes
10-29-50	11- 4-50	64	50	Yes
11- 5-50	11-11-50	65	50	No
11-12-50	11-18-50	64	54	Yes
11-19-50	11-25-50	65	54	Yes
11-26-50	12- 2-50	65	50	Yes
12- 3-50	12- 9-50	26	3	No
12-10-50	12-16-50	35	7	No
12-17-50	12-23-50	26	1	No
12-24-50	12-30-50	22	1	No
12-31-50	1- 6-51	18	1	No

14 ANSWER OF PLAINTIFF TO DEFENDANT'S OBJECTIONS TO INTERROGATORIES III AND IV—Filed October 16, 1952

(Number and Title Omitted)

Defendant's objections to plaintiff's Interrogatories Nos. III and IV appear to be primarily based on the contention that information sought is neither relevant nor material to the issues raised in plaintiff's complaint herein in that said interrogatories make inquiry as to facts entirely outside the scope of the pleading.

Plaintiff's complaint not only charges defendant with violations of the Fair Labor Standards Act insofar as its employees are concerned who are employed in work involving the extension, enlargement and improvement of the Gulf Intercoastal Canal and Waterway in the vicinity of Algiers, Louisiana, but also in paragraph VIII of the complaint defendant is charged with having repeatedly violated Sections 7 and 11(c) of the Act since the effective date thereof.

15 This is an action brought by the Secretary of Labor seeking an injunction enjoining defendant from future violations of the Act. The granting or withholding of injunctive relief as prayed for herein and after a full hearing has been had is wholly within the sound discretion of this court. In order that the court might properly exercise such discretion it should be fully advised and informed concerning any matters reflecting upon the probability of future violations of the Act by defendant. In this respect it is proper that the court consider the extent of violations, their nature, the period of time over which they extended, and all other circumstances in determining whether an injunction should issue. *Walling* v. *Rutherford Food Corp.*, 156 F. (2d) 513, affirmed 331 U. S. 722. See also *Caplin* v. *United Feature Syndicate*, 8 F. R. D. 424 (DC NY, 1948) where the court permitted inquiry as to other transactions of defendant which might bear on its good faith in dealing with the plaintiff.

Certainly defendant's past practices and present attitude, insofar as compliance or non-compliance with the Act he is here charged with violating is concerned, are both relevant and material to the issue as to whether or not an injunction should issue as prayed for herein. *Lenroot* v. *Kemp, et al*, 153 F. (2d) 153 (CA 5); *Lenroot* v. *Interstate Bakeries*, 146 F. (2d) 325 (CA 8).

16 Plaintiff respectfully submits that defendant's objections to Interrogatories Nos. III and IV should be

overruled and that defendant should be ordered and compelled to answer same.

Respectfully submitted.

WILLIAM S. TYSON, *Solicitor*
EARL STREET, *Regional Attorney*
T. HAGAN ALLIN, *Attorney*
United States Department of Labor.

Post Office Address: Earl Street, Regional Attorney, U. S. Department of Labor, 222 Fidelity Building, Dallas 2, Texas, or Office of the Solicitor, U. S. Department of Labor, Washington 25, D. C.

17 Hearing on objections of defendant to Interrogatories II and IV and Order sustaining same, (Minute Entry of October 22, 1952).

(Number and Title Omitted)

This cause came on this day to be heard on objections of defendant to certain interrogatories;

Present: Robert E. Leake, Jr.
Attorney for defendant;
Harry Campbell,
Attorney for plaintiff;

After hearing argument of counsel for the respective parties,

IT IS ORDERED that the objections of defendant to certain interrogatories be, and the same are hereby sustained.

18 REQUEST OF PLAINTIFF FOR ADMISSIONS—Filed December 26, 1952

(Number and Title Omitted)

Comes now Maurice J. Tobin, Secretary of Labor, United States Department of Labor, plaintiff above named, and serves the following request for admissions on the defendant above named under Rule 36, Federal Rules of Civil Procedure, to be admitted or denied within ten days from the date of service:

I.

(a) That the operations and place of business of defendant, C. W. Vollmer & Company, Inc., were inspected by a representative of the plaintiff beginning on January 12, 1951.

(b) That the inspection referred to above revealed the fact that many of defendant's employees had been and were employed by defendant for workweeks in excess of 40 hours without payment of additional compensation to such employees for all hours worked in excess of 40 during the workweek at one and one-half times the regular rates at which they were employed.

(c) That following the inspection in January, 1951, plaintiff's representative had a conference with Mr. E. S. Rogers, Superintendent, and Mr. J. C. Laplue, Engineer, representing the defendant, at which time they were fully advised concerning the appropriate provisions of the Fair Labor Standards Act, the corrective measures necessary to bring defendant's employment practices into compliance with said Act, and of defendant's responsibilities thereunder.

19 II.

(a) That following the inspection in January, 1951, numerous conferences were had between representatives of plaintiff and an attorney or attorneys of the law firm of Deutsch, Kerrigan & Stiles representing the defendant.

(b) That during conferences referred to above the question of coverage of defendant's employees under the provisions of the Fair Labor Standards Act was fully discussed.

(c) That defendant's legal counsel denied that defendant's operations subjected defendant to coverage under the Fair Labor Standards Act.

(d) That by letter dated July 31, 1951, William J. Rogers, Regional Director, Wage and Hour and Public Contracts Divisions, United States Department of Labor, wrote to Deutsch, Kerrigan & Stiles, attorneys at law, advising of the basis for the Division's position that the employees of defendant were covered under and entitled to the benefits of the Fair Labor Standards Act and requesting advice as to what steps defendant had taken to effect compliance with the Act.

(e) The copy of letter dated July 31, 1951, referred to in (d) above, attached hereto and marked "Exhibit No. 1," is a true and correct copy of such letter.

III.

That the records of C. W. Vollmer & Company, Inc., reflect that for the following workweeks defendant employed the named employees in the capacities indicated in connec-

tion with the construction of the Earthwork and Emergency Dam Storage, Algiers Lock, Algiers, Louisiana, for more than 40 hours without additional compensation for all hours worked in excess of 40 at one and one-half times the regular hourly rates at which they were employed:

(a) Workweek ending October 7, 1950

P. V. Pace, DL operator
Bobbie Doyle, DL oiler
James Thompson, oiler
L. D. Davis, motor patrol
Charles Page, bulldozer
Mark Phillips, bulldozer
Leon E. Lewis, bulldozer
Lawrence Payne, mechanic helper
Lucian Logan, truck driver
Lewis Matthews, dump foreman
James Long, euclid
Melvine Miller, euclid
Lonnie Cooper, euclid
Willie B. Lee, euclid
Henry T. Jefferson, euclid
Theo Page, laborer
Nat Brooks, laborer
Will Turner, Jr., laborer
Joseph Banks, laborer
Frank Miller, laborer

20 (b) Workweek ending October 14, 1950

Dewey Porter, DL operator
Mike J. Decker, DL oiler
James Thompson, oiler
L. D. Davis, patrol
Sam Hunter, patrol
Charles Page, bulldozer
Cliff Fleming, bulldozer
Mark Phillips, bulldozer
Leon E. Lewis, bulldozer
Charles Clark, bulldozer
Lawrence Payne, mechanic helper
Lewis Matthews, dump foreman
Sylvester Jenkins, dump foreman
James Watson, euclid
Charles Williams, euclid
John W. Mathis, euclid
James Long, euclid
Melvine Miller, euclid
Willie B. Lee, euclid
Henry T. Jefferson, euclid
McKenly Foreman, euclid
Willie Ross, euclid
Chas. B. Bouey, euclid
Leroy Cable, mechanic
Theo Page, laborer
Joseph Wells, laborer
Sammie General, Jr., laborer
Will Turner, Jr., laborer
Frank Miller, laborer
Dave Marks, laborer
August Edwards, labor foreman
William Toney, laborer
Gearry Jimcoily, laborer
Simon Jackson, laborer
Gibson Simoneaux, laborer
Leonce Aydell, laborer
Lester Aydell, laborer
Milton J. Rousseau, laborer
Ambrose R. Rousseau, laborer
Joseph Simoneaux, laborer
Joseph H. Vicknair, laborer

(c) Workweek ending October 21, 1950

P. V. Pace, dragline operator
Mark Phillips, bulldozer
Lucian Logan, truck driver

(d) Workweek ending October 28, 1950

Dewey Porter, DL operator
Mike J. Decker, DL oiler
James Thompson, DL oiler
Leroy Cable, mechanic
Lawrence Payne, mechanical helper
Lewis Matthews, dump foreman
Sylvester Jenkins, dump foreman
L. D. Davis, patrol operator
Charles Page, bulldozer
Mark Phillips, bulldozer
Leon E. Lewis, bulldozer
James Long, euclid driver
Willie B. Lee, euclid driver
Henry Jefferson, euclid
Willie Ross, euclid
Edison F. Jones, euclid
James Watson, euclid
John Mathis, euclid
Lubay F. Bergeron, truck driver
Houston Armstead, laborer
Felix Small, laborer
August Edwards, labor foreman
William Toney, laborer
Will Turner, Jr., laborer
Henry Anderson, laborer
Joe McFadden, euclid driver

(e) Workweek ending November 4, 1950

Dewey Porter, DL operator
P. V. Pace, DL operator
Ed B. Weathers, DL operator
J. M. Clifton, DL oiler
Mike J. Decker, DL oiler
Bobbie Doyle, DL oiler
Walter Waggoner, DL oiler
James Thompson, DL oiler
Lubay F. Bergeron, DL oiler
Leroy Cable, mechanic
Lawrence Payne, mechanic helper
Joe Harris, mechanic helper
Lewis Matthews, dump foreman
Sylvester Jenkins, dump foreman
Lucian Logan, truck driver
Cliff Fleming, bulldozer
Charles Page, bulldozer
Mark Phillips, bulldozer
Leon E. Lewis, bulldozer
Frank Smith, bulldozer
L. D. Davis, patrol operator
James Long, euclid
Willie B. Lee, euclid
Chas. E. Buoey, euclid
Edison F. Jones, euclid
Ernest S. Strong, euclid
Charlie Porter, euclid
John Mathis, euclid
Joe McFaddin, euclid
August Edwards, labor foreman
Houston Armstead, laborer
Felix Small, laborer
Theo Page, laborer
Will Turner, Jr., laborer
Henry Anderson, laborer
James Watson, euclid
Oscar Jimcoily, laborer
Robert Brooks, laborer
Joseph Jackson, laborer

21 (f) Workweek ending November 18, 1950

P. V. Pace, DL operator
Dewey Porter, DL operator
Bobby Doyle, DL oiler
Mike J. Decker, DL oiler
James Thompson, DL oiler
Lawrence Payne, mechanic helper
Lucian Logan, truck driver
Sylvester Jenkins, dump foreman
Sam Hunter, patrol
Mark Phillips, bulldozer
Frank Smith, bulldozer
Frank Hays, bulldozer
James Long, euclid
Edison F. Jones, euclid
Charlie Porter, euclid
Charlie Williams, euclid
John Mathis, euclid
Willie Williams, euclid
Roosevelt Turpin, euclid
Houston Armstead, laborer
Theo Page, laborer
Adolph Anderson, laborer
Robert Brooks, laborer
Master Simon, laborer
Simon Jackson, laborer
Joseph Wells, laborer
Ed B. Weathers, DL operator
S. Guy Scrams, DL operator
Walter Waggoner, DL oiler
J. M. Clifton, DL oiler
Leroy Cable, mechanic
Joe Harris, mechanic helper
Lewis Matthews, dump foreman
L. D. Davis, patrol
Charles Page, bulldozer
Leon E. Lewis, bulldozer
Cliff Fleming, bulldozer
Charles B. Boney, euclid
Willie B. Lee, euclid
Ernest Strong, euclid
James Watson, euclid
Howard Desselle, euclid
Joe McFaddin, euclid
Isaac Minor, euclid
Jack Williams, Jr., euclid
Felix Small, laborer
Henry Anderson, laborer
Oscar Jimcoily, laborer
Joseph Jackson, laborer
Frank Miller, laborer
August Edwards, labor foreman
Lubay F. Bergeron, laborer

(g) Workweek ending November 25, 1950

Dewey Porter, DL operator
P. V. Pace, DL operator
Mike J. Decker, DL oiler
James Thompson, DL oiler
Walter Waggoner, DL oiler
Lawrence Payne, mechanical helper
Lucian Logan, truck driver
Sylvester Jenkins, dump foreman
Charlie Porter, patrol
Mark Phillips, bulldozer
Frank Smith, bulldozer
Frank Hayes, bulldozer
James Long, euclid
Edison F. Jones, euclid
Howard Desselle, euclid
Isaac Minor, euclid
James Watson, euclid
Joe McFaddin, euclid
George King, euclid
August Edwards, labor foreman
Will Turner, Jr., laborer

Frank Miller, laborer
Henry Anderson, laborer
Oscar Jimcoily, laborer
Joseph Wells, laborer
Master Simon, laborer
S. Guy Scrams, DL operator
Ed B. Weathers,
DL operator
J. M. Clifton, DL oiler
Bobbie Doyle, DL oiler
Leroy Cable, mechanic
Joe Harris, mechanic helper
Lewis Matthews,
dump foreman
L. D. Davis, patrol
Charles Page, bulldozer
Leon E. Lewis, bulldozer
Cliff Fleming, bulldozer
Roosevelt Smith, bulldozer
Willie B. Lee, euclid
Ernest Strong, euclid
Simon Jackson, euclid
Chas. B. Boney, euclid
John W. Mathis, euclid
Willie Williams, euclid
Roosevelt Turpin, euclid
Felix Small, laborer
Adolph Anderson, laborer
Noel Carter, laborer
Garay Jimcoily, laborer
Robert Brooks, laborer
Joseph Jackson, laborer
Lubay F. Bergeron, laborer

(h) Workweek ending December 2, 1950

P. V. Pace, DL operator
Dewey Porter, DL operator
Bobbie Doyle, oiler
James Thompson, oiler
Mike J. Decker, oiler
Lawrence Payne,
mechanic helper
Lucian Logan, truck driver
Sylvester Jenkins,
dump foreman
Ed B. Weathers,
DL operator
S. Guy Scrams, DL operator
Walter Waggoner, oiler
J. M. Clifton, oiler
Leroy Cable, mechanic
Joe Harris, mechanic helper
Lewis Matthews,
dump foreman
L. D. Davis, patrol

22 (h) Workweek ending December 2, 1950—continued

Sam Hunter, patrol
Leon E. Lewis, bulldozer
Cliff Fleming, bulldozer
Roosevelt Smith, bulldozer
Willie B. Lee, euclid
Charlie Porter, euclid
James Watson, euclid
Joe McFaddin, euclid
Chas. B. Boney, euclid
Will Turner, laborer
Harry Anderson, laborer
August Edwards,
labor foreman
Charlie Page, bulldozer
Frank Smith, bulldozer
Frank Hayes, bulldozer
James Long, euclid
Edison F. Jones, euclid
Isaac Minor, euclid
John Mathis, euclid
George King, euclid
Felix Small, laborer
Gearry Jimcoily, laborer
Oscar Jimcoily, laborer

(i) Workweek ending June 2, 1951

J. R. Hill, operator
Lawrence Payne, oiler
James Thompson, euclid
Wm. James, bulldozer
Joseph Jackson, laborer
Henry Dixon, motor patrol
Willie Tetter, oiler
Lucian Logan, euclid
August Edwards, euclid
Charlie Page, bulldozer
J. H. Smith, euclid

(j) Workweek ending June 9, 1951

Leroy Cable, mechanic

(k) Workweek ending June 23, 1951

E. C. Johnson, operator
Geo. King, euclid
August Edwards, euclid
Johnnie Jones, euclid
Lonzo Caighton, euclid
Tom Porter, spotter
Jesse Wilson, bulldozer
Sam Hunter, motor patrol
Joe Harris, mechanic helper
Oscar Jimcoily, laborer
Frank Miller, laborer
Manuel LaCrosse, laborer
Davis Oedouet, laborer
Henry Ruffin, laborer
Nathaniel Brooks, laborer
Otha M. Bey, laborer
E. J. Houillion, truck driver
James Thompson, oiler
Leroy Cable, mechanic
J. P. Wolf, oiler
J. C. Walker, euclid
Joe McFaddin, euclid
Dick Brewer, euclid
Tom Moore, spotter
Mack Clark, bulldozer
Charlie Page, bulldozer
Albert Allen, motor patrol
Joseph Jackson, laborer
Joseph Wells, laborer
Master Simon, laborer
Noel Carter, laborer
Lawrence Cook, laborer
Wilbert Ruffin, laborer
A. P. Phillips, laborer
M. S. Foster, foreman
Lucian Logan, truck driver
Lawrence Payne, oiler

(l) Workweek ending June 30, 1951

E. C. Johnson, operator
August Edwards, euclid
Lawrence Payne, oiler
J. P. Wolf, oiler
Lucian Logan, truck driver
Leroy Cable, mechanic

(m) Workweek ending July 7, 1951

E. C. Johnson, operator
J. P. Wolf, oiler
James Thompson, oiler
August Edwards, euclid
Joe McFaddin, euclid
Charlie Page bulldozer
James Wallace, bulldozer
E. J. Houillion, truck driver
Tom Moore, spotter
Oscar Jimcoily, laborer
Joseph Wells, laborer
David Declouet, laborer

Master Simon, laborer
J. R. Hill, operator
S. V. Brooks, oiler
Dick Brewer, euclid
J. C. Walker, euclid
Charlie Clark, euclid
Jesse Wilson, bulldozer
Lucian Logan, truck driver
Leroy Cable, mechanic
Joseph Jackson, laborer
M. S. Foster, foreman
N. B. Forcell, laborer
A. P. Phillips, laborer

23 (n) Workweek ending July 14, 1951

E. C. Johnson, DL operator
J. P. Wolf, oiler
Chas. Page, bulldozer
Lucian Logan, truck driver
J. R. Hill, DL operator
James Thompson, oiler
Jesse Wilson, bulldozer
Joe Harris, mechanic helper

(o) Workweek ending July 21, 1951

E. C. Johnson, DL operator
J. P. Wolf, oiler
Chas. Page, bulldozer
Cliff Fleming, bulldozer
August Edwards, euclid
James Thomas, euclid
Joe Harris, mechanic helper
Joe McFaddin, euclid
Emanuel LaCrosse, laborer
Otha Bey, laborer
A. P. Phillips, laborer
J. R. Hill, DL operator
Stanford Brooks, oiler
Jesse Wilson, bulldozer
J. C. Walker, motor patrol
Geo. King, euclid
James Watson, euclid
Lucian Logan, truck driver
Oscar Jimcoily, laborer
Noel Carter, laborer
Henry Ruffin, laborer
Felix Small, truck driver

(p) Workweek ending July 28, 1951

E. C. Johnson, operator
J. P. Wolfe, oiler
Lucian Logan, truck driver
J. R. Hill, operator
S. V. Brooks, oiler
Felix Small, truck driver

(q) Workweek ending August 11, 1951

E. C. Johnson, operator
J. P. Wolf, oiler
Jesse Wilson, bulldozer
James Thomas, euclid
James Watson, euclid
Joe Harris, mechanic helper
Joseph Jackson, laborer
Nat Brooks, laborer
J. R. Hill, operator
Lawrence Payne, oiler
Cliff Fleming, bulldozer
Joe McFaddin, euclid
Leroy Cable, mechanic
Felix Small, truck driver
Oscar Jimcoily, laborer
James Thompson, euclid

(r) Workweek ending August 18, 1951

E. C. Johnson, operator
J. P. Wolf, oiler
Charlie Page, bulldozer
Cliff Fleming, bulldozer

Joe McFaddin, euclid
Leroy Cable, mechanic
Lucian Logan, truck driver
Joseph Jackson, laborer
Manuel LaCrosse, laborer
Otha Bey, laborer
J. R. Hill, operator
Lawrence Payne, oiler
Jesse Wilson, bulldozer
James Thomas, euclid
James Watson, euclid
Joe Harris, mechanic helper
Felix Small, truck driver
Oscar Jimcoily, laborer
Nat Brooks, laborer
A. P. Phillips, laborer

(s) Workweek ending September 1, 1951

Lawrence Payne, oiler
Charlie Page, bulldozer
Cliff Fleming, bulldozer
Felix Small, truck driver
James Thompson, oiler
Jesse Wilson, bulldozer
Joe Harris, mechanic helper

(t) Workweek ending September 8, 1951

E. C. Johnson, operator
Dewey Porter, operator
James Thompson, oiler
Charlie Page, bulldozer
Joe Harris, mechanic helper
Joseph Jackson, laborer
Otha Bey, laborer
August Edwards, laborer
P. V. Pace, operator
Harold Jones, oiler
J. P. Wolfe, oiler
Jesse Wilson, bulldozer
Felix Small, truck driver
Oscar Jimcoily, laborer
A. P. Phillips, laborer

24 (u) Workweek ending September 15, 1951

Lucian Logan, truck driver

WILLIAM S. TYSON, *Solicitor*
EARL STREET, *Regional Attorney*
T. HAGAN ALLIN, *Attorney*
United States Department of Labor.

Post Office Address: Earl Street, Regional Attorney, U. S. Department of Labor, 222 Fidelity Building, Dallas, Texas, or Office of the Solicitor, U. S. Department of Labor, Washington 25, D. C.

T. Hagan Allin, one of the attorneys of record for the plaintiff, certifies that he served a full, true and correct copy of the within and foregoing Requests for Admissions upon Mr. Robert E. Leake, Jr., of the firm of Deutsch, Kerrigan & Stiles, attorneys for defendant, by placing a copy of the same in the United States mail in a franked envelope addressed to him at his last-known address at Hibernia Bank Building, New Orleans, Louisiana, on the 22nd day of December, 1952.

T. HAGAN ALLIN.

25 ANSWER TO REQUEST FOR ADMISSIONS—Filed Jan. 5, 1953

(Number and Title Omitted)

Defendant makes the following answers in response to the requests for admissions served on it by plaintiff on December 24, 1952:

First

Defendant admits the truth of the matters set forth in Request No. III, all subsections.

Second

Defendant heretofore has filed timely objections to Requests No. I and II, all subsections.

ROBERT E. LEAKE, JR.,
Of DEUTSCH, KERRIGAN & STILES,
1700 Hibernia Bank Building,
New Orleans 12,
Attorneys for Defendant.

CERTIFICATE

I certify that two copies of the foregoing answer to requests for admissions have been served on plaintiff by mailing same to his counsel, Honorable Earl Street, 222 Fidelity Building, Dallas, Texas, this 3rd day of January.

ROBERT E. LEAKE, JR.

26 OBJECTION OF DEFENDANT TO REQUESTS FOR ADMISSIONS NOS. I AND II—Filed January 5, 1953

(Number and Title Omitted)

Defendant hereby objects to Requests No. I and II, all subsections, of the requests for admissions served on it by plaintiff on December 24, 1952, on the ground that same are irrelevant to this action and no evidence relating thereto would properly be receivable in evidence on the trial hereof; and objects further that Request No. I(b) is improper because it apparently refers to reports or records of conclusion in plaintiff's hands and not available to defendant, and that Request No. I(c) is improper because it calls for opinions and conclusions of law as to which defendant is not required to comment.

WHEREFORE defendant moves the court for an order striking the requests mentioned above and relieving it from the duty of answering them.

ROBERT E. LEAKE, JR.,
Of DEUTSCH, KERRIGAN & STILES,
1700 Hibernia Bank Building,
New Orleans 12,
Attorneys for Defendant.

NOTICE

To: Honorable Earl Street,
222 Fidelity Building,
Dallas, Texas,
Attorney for Plaintiff.

Please take notice that the foregoing objections to the requests for admissions served in this cause by you on December 24, 1952, will be brought for hearing before the United States District Court at the United States
27 Post Office Building, New Orleans, Louisiana, on Wednesday, January 14, 1953, at 11:00 o'clock A. M., or as soon thereafter as counsel can be heard.

New Orleans, January 3, 1953.

ROBERT E. LEAKE, JR.

CERTIFICATE

I certify that two copies of the foregoing objections and notice thereof have been served on plaintiff by mailing same to his counsel, Honorable Earl Street, 222 Fidelity Building, Dallas, Texas, this 3rd day of January.

ROBERT E. LEAKE, JR.

28 PLAINTIFF'S RESPONSE TO DEFENDANT'S OBJECTIONS TO REQUEST FOR ADMISSIONS—Filed January 12, 1953

(Number and Title Omitted)

The basic objection advanced by the defendant to the Requests for Admissions heretofore filed upon it by the plaintiff is that the evidence sought is irrelevant. Defendant states that it has been unable to find any authorities in point.

It may be conceded for the purpose of this action that Requests for Admissions under Rule 36 of the Federal Rules of Civil Procedure must be directed to obtaining relevant evidence for use in the trial of the proceeding. Nevertheless, plaintiff asserts, and is supported by appropriate au-

thorities that evidence of the nature here desired, that is, the history of past violations and statements of the attitude of the employer-defendant is relevant. It is, of course, too patent to require citation that the issuance of an injunction under Section 17 of the Fair Labor Standards Act (29 U. S. C. 217) is within the sound judicial discretion of the Court, that it is not intended as punishment for past violations but to assure compliance in the future.

It is obvious that the past attitude and the past history of the employer-defendant is material and relevant to enable the Court properly to exercise its sound judicial discretion.

29 The decisions are consistent that in the absence of any intention on the part of the employer-defendant to violate in the future that the Court does not abuse its discretion in denying an injunction. This, of course, requires a determination on the part of the Court of the intention and attitude of the employer-defendant. Such intention or attitude can be determined only from proof of what the employer-defendant has done in the past and the attitude that he has taken in the past.

There are numerous decisions relative to how such intention as to future activities may be determined, two of the principal decisions being from the United States Court of Appeals for the Fifth Circuit.

In the case of *Lenroot* v. *Kemp and Pitts*, 153 F. (2d) 153, an action brought under the child labor provisions of the Fair Labor Standards Act, (29 U.S.C., Sec. 203(1) 215 (a)(4)) the District Court denied an injunction. The record reflected, among other things, investigations which disclosed violations in 1941 and 1943, with reference to Kemp and Pitts and in 1941, 1942, 1943, and 1944, with reference to the Hazlehurst Mercantile Company, a defendant in a companion case, with violations found at each time, and no attempt by the employer-defendants at any time to comply with the Act. The District Judge denied the injunction because of his knowledge of the general standing and reputation of defendants as substantial and outstanding citizens and his belief that they would not violate this law in the future. In reversing the case, and remanding it for the entry of an injunction the Circuit Court said:

> "The repeated, persistent, and deliberate violations by the defendants must be balanced against the reputation of which the trial judge spoke. Confronted with facts showing active violations, belief in the future course of law-observance, based merely upon the de-

fendants' reputation of being law abiding, is not enough. Lip service to a law, with a background of violations, does not guarantee future compliance."

In brief, the evidence there considered by the Circuit Court as *requiring* the issuance of an injunction is substantially the same which this plaintiff has requested through the vehicle provided by Rule 36. Similar result was reached by the Eighth Circuit in *Lenroot* v. *Interstate Bakeries*, 146 F. (2d) 325.

In the case of *Fleming* v. *Jacksonville Paper Company*, 128 F. (2d) 395 at 399, the Circuit Court commented upon the refusal of the trial court to hear evidence relative to the existence of violations during a period prior to the institution of the action. The appellate court said:

> "We think it would have been in order to hear whether the violations were continuing and whether if they had ceased there was no *purpose* to renew them." (Emphasis supplied)

The latest case relative to the propriety of testimony concerning the past history of violations and the attitude taken by an employer-defendant is that *Tobin v. Anthony-Williams Manufacturing Company*, (C.A. 8) 196 F. (2d) 547. In that case, the Court in speaking of the failure of the trial court to grant an injunction for record keeping violations stated that on the record before it the trial court erred in failing to enjoin defendant from record keeping violations. In connection therewith, in addition to pointing out the lack of any testimony relative to future compliance, the court further set forth that

> "Evidence adduced on the trial showed that the defendant had failed to comply up to the time of the trial, *even after two warnings were given.*" (Emphasis supplied).

It is respectfully submitted that the evidence sought to be obtained by plaintiff's Requests I and II is both relevant and material and that the defendant's objections thereto should be overruled.

(S.) Wm. S. Tyson,
Solicitor,
(S.) Earl Street,
Regional Attorney,
(S.) T. Hagan Allen,
Attorney,
United States Department of Labor.

31 HEARING ON OBJECTIONS TO REQUEST FOR ADMISSIONS AND SUBMISSION—(Minute Entry of January 14th, 1953)

(Number and Title Omitted)

This cause came on this day for hearing on objections of defendant to requests for admissions;

Present: Robert E. Leake, Jr., Attorney for defendant;

Counsel for plaintiff being absent;

After hearing statement of counsel for the defendant, the matter was submitted and the court took time to consider.

32 ORDER OVERRULING OBJECTIONS OF DEFENDANT TO REQUEST FOR ADMISSIONS AND ALLOWING DEFENDANT 10 DAYS TO ANSWER THE REQUESTS FOR ADMISSIONS—(Minute entry of January 15, 1953)

(Number and Title Omitted)

This cause came on to be heard on January 14, 1953, on the objections of defendant to requests for admissions and after hearing statements of counsel t[illegible] matter was submitted, when the Court took time to consider;

Now, on due consideration therof;

It is ordered by the Court that the objections of defendant to requests for admissions be and the same are hereby, overruled and defendant is allowed 10 days to answer the requests for admissions:

Lenroot v. *Kemp & Pitts*, 153 F. 2d 153 (C.C.A. 5).

33 ANSWER OF DEFENDANT TO REQUEST FOR ADMISSIONS Nos. I & II—Filed January 23, 1953

(Number and Title Omitted)

With full reservation of all of its rights under its objections to Requests Nos. I & II, all subsections, of the requests for admissions served on it by plaintiff on December 24, 1952, which objections were overruled by the court on January 16, 1953, and expressly reserving all objections which it has, or may have, as to the admissibility, relevance, materiality and evidentiary value of such requests, and the answers herein given thereto, defendant makes the following answers to said requests for admissions:

First

(a) Defendant admits the truth of the matters set forth in Request No. I(a) and (b).

(b) For response to Request No. I(c), defendant admits that following the inspection in January, 1951, a representative of plaintiff conferred with the named employees of defendant and advised said employees of plaintiff's contention that defendant's employees on its job near Algiers, Louisiana, for the construction of the Earthwork and Emergency Dam-Storage, Algiers Lock, were covered by the Fair Labor Standards Act, as a consequence of which, plaintiff advised said employees, defendant should compensate its employees for all hours worked in excess of 40 during any work at one and one-half times the regular rates of pay at which they were employed, and should keep its records so as to reflect such payments.

Second

(a) For response to Request No. II(a), defendant admits that on or about January 16, 1951, an investigator for the New Orleans office of the Wage and Hour Division of the United States Department of Labor, whose name is
34 believed to be Wilenzick, telephoned Robert E. Leake, Jr., Esq., an attorney associated with the firm of Deutsch, Kerrigan & Stiles, counsel for defendant, and advised Mr. Leake that he was conducting an investigation of defendant's operations on the Algiers Lock project, but had not yet made a report. On June 25, 1951, Mr. Leake conferred with Mr. J. Sidney Gonsoulin, Field Office Supervisor of the Wage and Hour Division, United States Department of Labor, New Orleans office, for about one hour. There were no other conferences between the named persons or representatives prior to suit.

(b) For response to Request No. II(b), defendant admits that at the conference of June 25, 1951, mentioned in the preceding paragraph, the subject under discussion was the question of coverage of defendant's employees on the Algiers Lock project under the Fair Labor Standards Act. Discussion, however, was limited because Mr. Gonsoulin advised Mr. Leake at the outset that the matter was out of his hands because a report had been forwarded from his office, and that defendant should submit a written statement of its position. Defendant submitted such statement on June 28, 1951.

(c) Defendant admits the truth of the matters set forth in Request No. II(c) and (d), and states further that plaintiff's letter was promptly answered on August 8, 1951.

(d) Defendant is unable to respond to Request No. II(e), for the reason that said "Exhibit No. 1" is not attached to

the original pleading of record, nor was a copy thereof served on defendant.

ROBERT E. LEAKE, JR.
of
DEUTSCH, KERRIGAN & STILES,
Attorneys for Defendant.

CERTIFICATE

I certify that two copies of the foregoing answers to requests for admissions have been served on plaintiff by mailing same to his counsel, Honorable Earl Street, 222 Fidelity Building, Dallas, Texas, this 23rd day of January, 1953.

ROBERT E. LEAKE, JR.

35 MOTION FOR SUBSTITUTION OF PLAINTIFF AND ORDER GRANTING SAME—Filed February 18, 1953

(Number and Title Omitted)

Martin P. Durkin, Secretary of Labor, United States Department of Labor, moves the Court for an order substituting him as plaintiff in the above styled and numbered cause in the place and stead of Maurice J. Tobin, Secretary of Labor, United States Department of Labor, on the ground that the said Maurice J. Tobin has resigned his position as such Secretary and the applicant, Martin P. Durkin, is now the duly appointed and qualified Secretary of Labor, United States Department of Labor, and that as such Secretary has succeeded to all the rights, duties, and prerogatives of the said Maurice J. Tobin, heretofore appearing as the Secretary of Labor, and as plaintiff in this action, and that there is a substantial need for continuing and maintaining this cause of action.

Dated this 18th day of February, 1953.

WILLIAM S. TYSON,
Solicitor,
EARL STREET,
Regional Attorney,
T. HAGAN ALLIN,
Attorney,
United States
Department of Labor.

Post Office Address: Office of the Solicitor, U. S. Department of Labor, 222 Fidelity Building, Dallas 2, Texas, or Office of the Solicitor, U. S. Department of Labor, Washington 25, D. C.

36 ORDER

This cause came on to be heard on motion of the plaintiff to substitute Martin P. Durkin, Secretary of Labor, United States Department of Labor, as plaintiff herein in the place and stead of Maurice J. Tobin, his predecessor in office, and it being satisfactorily shown to this Court that Martin P. Durkin is now the duly appointed and qualified Secretary of Labor, United States Department of Labor, and that there is substantial need for continuing and maintaining the above entitled action and obtaining an adjudication of the questions involved therein, it is

Ordered that Martin P. Durkin, Secretary of Labor, United States Department of Labor, be, and he hereby is, substituted as plaintiff herein in the place and stead of Maurice J. Tobin, without prejudice to the proceedings already had in this action, and that this cause may be continued and maintained by the said Martin P. Durkin as successor to the rights, duties, and prerogatives of the said Maurice J. Tobin.

Dated this 18th day of February, 1953.

J. SKELLY WRIGHT,
United States District Judge.

February 12, 1953. No objection, submitted without prejudice.

ROBERT E. LEAKE, JR.,
Attorneys for Defendant.

37 TRIAL OF CASE AND SUBMISSION—(Minute Entry of July 5th, 1953)

(Number and Title Omitted)

This cause was this day called for trial without the intervention of a jury:

Present: T. HAGAN ALLIN, HARRY CAMPBELL, Attorneys for plaintiff; ROBERT E. LEAKE, JR., Attorney for defendant.

After various evidence was introduced by counsel for the plaintiff, the following named witness was called and testified on behalf of the plaintiff:

A. A. MATSON,

and, after hearing evidence and testimony on behalf of plaintiff, counsel rested.

Witness for defendant:

CLARENCE VOLLMER,

and, after hearing evidence and testimony on behalf of the defendant, counsel rested. The matter was submitted and the Court took time to consider. Counsel to prepare proposed Findings of Fact and Conclusions of Law within 15 days.

38 TESTIMONY—Filed September 1, 1953

(Number and Title Omitted)

Proceedings had before Honorable J. Skelly Wright, Judge, United States District Court for the Eastern District of Louisiana, in the above entitled and numbered cause, on June 5, 1953, at New Orleans, Louisiana.

* * * * * * *

Appearances: T. HOGAN ALLIN, ESQ., HARRY CAMPBELL, ESQ., Attorneys for Plaintiff; Messrs. DEUTSCH, KERRIGAN & STILES, ROBERT E. LEAKE, JR., ESQ., Attorneys for Defendant.

* * * * * * *

39 Offer:

Mr. Allin: If Your Honor please, plaintiff would like to offer, introduce and file in evidence interrogatories submitted to defendant herein on September 25, 1952, and defendant's responses thereto, and plaintiff's requests for admissions served on defendant on December 22, answered in part on January third, and further answered on January 23, 1953. They will constitute claimant's exhibits Nos. 1, 2, 3 and 4, in that order, I suppose.

The Court: The questions would be one; the answers to the interrogatories would be two; requests for admissions would be three and the further answers to requests for admissions would be four .

Mr. Allin: That is right. They were answered partially, and then later on further answered.

The Court: I think to make the matter crystal clear, suppose you get the exhibits out of the record and mark them as exhibits, and make them part of the record.

Mr. Allin: Yes, sir.

Plaintiff offers in evidence interrogatories which were

filed on February 29, 1952 and served on Counsel for
40 defendant, as exhibit No. 1.

Plaintiff offers in evidence, as exhibit No. 2, defendant's answers to interrogatories, which were filed on October 14, 1952.

Plaintiff offers as exhibit No. 3, requests for admissions, filed on December 26, 1952, and served on Counsel for defendant.

Plaintiff offers as exhibit No. 4, the partial response to plaintiff's requests for admissions, which was filed January 5, 1953.

Plaintiff offers exhibit No. 5, additional responses and answers to plaintiff's requests for admissions, filed January 23, 1953.

Objection:

Mr. Leake: With reference to the interrogatories, I would like to object to the offer of interrogatories three and four, on the ground the objection was timely taken and overruled by the Court; to plaintiff's exhibit No. 3, being the requests for admissions that were served. Counsel for respondent objects to the offer of No. 1 and No. 2 and subsections, and to the introduction in its entirety of plaintiff exhibit No. 5, the Court having overruled the objection which was timely made by the respondent, as to the admissibility, relevancy, materiality and evidentiary value of the case at Bar.
41 Does the Court care to know the nature of those?

The Court: No. The Court has read them. I overrule the objection. The interrogatories speak for themselves.

Mr. Leake: We would like for the objection to be made part of the defendant's case.

The Court: It is so understood.

Mr. Allin: I would like to read into the record the stipulation agreed to between the plaintiff and defendant herein:

Plaintiff, Martin P. Durkin, Secretary of Labor, and defendant, C. W. Vollmer & Company, Inc., a corporation, hereby stipulate as follows. However, each of the parties hereto reserves the right to object to the admission and consideration of any matter contained in this stipulation on grounds of irrelevancy or immateriality, and to introduce other evidence not contradictory of or in conflict with the statements of fact set forth herein:

Mr. Leake: At that particular stage, the only objection I have is as to some of the documents stated in number one, which Counsel will read, the statements he will introduce

in evidence, without making formal proof as to their
42 authenticity.

Mr. Allin: That is correct.

The Court: I believe the statement was, he has a right to object to the relevancy and materiality.

Mr. Allin: That is right.

The Court: Your stipulation is only to the authenticity of the documents?

Mr. Leake: To be discussed after.

Mr. Allin: The following documents may be introduced in evidence, subject to objection on the ground of materiality or relevancy, without making formal proof as to their authenticity.

Mr. Leake: That is substantially correct. I don't want the Court to understand that I am taking the position anything in the documents are admissible per se. The authenticity of the documents, defendant waives.

The Court: All right.

43 Mr. Allin: (a) Senate Document No. 188, 78th Congress, 2nd Session, "Intracoastal Waterway from the Mississippi River at New Orleans, La., to Corpus Christi, Tex.," which is the report prepared by the Corps of Engineers, and Department of the Army, at the request of the Senate, and which report and recommendation was adopted, and the construction disclosed therein authorized by the Act of March 2, 1945, being Public Law 14, marked Plaintiff Exhibit-6.

(b) Construction Contract No. DA-16-047-eng-796 between Corps of Engineers, Department of the Army, and C. W. Vollmer & Company, Inc., which is offered in evidence as Plaintiff Exhibit-7.

(c) Plans for Earthwork and Emergency Dam Storage, Algiers Lock, Orleans Parish, Louisiana, dated 1950, prepared by the Corps of Engineers, U. S. Army, and consisting of contract drawings, maps and specifications (F-1 through F-11) which by the terms of the contract in (b) above were made a part thereof, which is offered in evidence as Plaintiff Exhibit-8.

(d) Nine photostats consisting of statistical information pertaining to the Gulf Intracoastal Waterway between Apalachee Bay, Florida, and the Mexican border, which were prepared by the New Orleans District Office, Corps of Engineers, Department of the Army, for inclusion
44 in the Annual Report of the Chief of Engineers, 1952, entitled "Commercial Statistics, Water-Borne Commerce of the United States, for the Calendar Year 1951,", which is offered in evidence as Plaintiff Exhibit-9.

(e) A photostat entitled "Statement of Barge, Shallow Draft and Other Commerce Between Mississippi River and Gulf Intracoastal Waterway at Harvey, Plaquemine and Industrial Canal Locks, Louisiana," officially prepared by the New Orleans District Office, Corps of Engineers, Department of the Army,", offered in evidence as Plaintiff Exhibit-10.

Mr. ALLIN: If Your Honor please, I tendered to Mr. Leake another document, but I haven't heard from him as to what his position is on that.

Mr. LEAKE: The only problem involved is I have not had opportunity to check the figures involved. I can say this, that as to the authenticity of the paper, being what it purports to be, I have no reason to hold Counsel for that, but as far as evidentiary value and admissibility, I wish to reserve objection to that.

The COURT: All right.

45 Mr. ALLIN: The staff memorandum prepared in the New Orleans District Office of the Corps of Engineers, Department of the Army, at the request of Mr. Fitzpatrick of the Executive Branch, and prepared by Mr. S. J. Palmissano, headquarters, Commercial Statistics, Water-Borne Commerce, under date of May 13, 1953, and offered in evidence as Plaintiff Exhibit-11.

Mr. LEAKE: I don't want to interrupt the offer to make the objection, but I think in connection with the reading of the stipulation, I might make my objection.

The COURT: Does that complete your offer with reference to documents?

Mr. ALLIN: Stipulation Two. Plaintiff's exhibit No. 12 is a true and correct copy of the letter dated July 31, 1951, addressed to and received by Deutsch, Kerrigan & Stiles, Attorneys at Law, Hibernia Bank Building, New Orleans, 12, Louisiana by William J. Rogers, Regional Director, Wage and Hour and Public Contracts Divisions, U. S. Department of Labor.

Stipulation Three. (a) On or about September 10, 1950, defendant, C. W. Vollmer & Company, Inc., began work under the terms of the contract referred to in I(b)
46 above and in accordance with the plans, drawings, maps and specifications referred to in I(c) above.

3(b) The work under said contract was completed on November 29, 1952, and on December 15, 1952, the United States formally accepted the work.

3(c) The work actually done by the defendant and its employees was performed in accordance with the terms of

said contract and the plans, specifications, maps and drawings made a part thereof.

The Court: Does that complete your offer, Mr. Allin?

Mr. Allin: That is right, Your Honor. It does.

Objection:

Mr. Leake: Plaintiff's Exhibit-6, which is Senate Document 188, respondent objects to the admissibility of that document per se.

First, on the ground the document is not the firsthand or best evidence of any of the facts it purports to establish.

Second, the document is a request for appropriation and authorization to perform work, and has no reference to the issues involved in this case; that it amounts to an opinion of the officials who were the authors of the document, at the time the document was written perhaps.

47 Those officials are not present and open to cross-examination by defendant, and may or may not be the current opinion. Furthermore, there is a great portion of the document which is irrelevant to the particular case at Bar. That is the principal objection to Plaintiff Exhibit-6.

The Court: The Court will admit the case is not being tried by a jury, and irrelevant parts will be disregarded. It is a Senate Document and seems to pertain to this Intracoastal Waterway.

Mr. Leake: Yes, it does. The document, such as the document in question, has been held admissible in cases dealing with the Constitutionality of construction projects by the government for years in Oklahoma, and involves the power of Congress to construct dams on Red River, or one of the rivers in the Oklahoma District. That was the attitude of Congress on that particular problem, but no holding that Counsel for respondent has ever been able to find that the document, such as the one in question, is admissible to prove facts of a case involving a private litigant.

The Court: I think the purpose is to show the intention on the part of the Agency charged with the construction of this waterway, as to what the waterway will be and

48 what service it should render. I think that is the purpose of the introduction of the document, and for that purpose I think it is admissible. Is that the purpose?

Mr. Allin: Yes, Sir.

The Court: The Court will admit the document.

Mr. Leake: Exhibits P-9 and P-10 is statistical information which the Corps of Engineers compiled, concerning use of Gulf Intracoastal Waterway at Harvey, and we object to

them as immaterial and irrelevant. This case involves the construction of a project, and the particular documents have no relevancy whatever to the contract in question.

The COURT: The Court will overrule that objection. The theory of the government's case is, as I understand it, is that this particular construction is part of the over-all intracoastal waterway system, and the Court is going to allow the government to put in such evidence.

Mr. LEAKE: In connection with the same objection to P-11, the objection is made that the statistics were not broken down in any way to show whether it is interstate or intrastate movement, which was given to the officials of the Water-Borne Commerce statistical section in connection with lockages and vessels through Harvey Lock for a stated period. Instead of being evidence of facts, it is so broad and general the Court cannot determine what value, if any, could be given to it.

The COURT: The purpose is the need of an alternate route.

Mr. ALLIN: Yes, Sir, showing Harvey Lock as one route available. The purpose of this is to show the need of an alternate route.

Objection:

Mr. LEAKE: We object to P-12, which is a letter from the Regional Director, Mr. Rogers, who is Regional Director of the Department of Labor, to Counsel for respondent, a letter which was passed along in the course of negotiations, or at least discussed between Counsel before the institution of the suit. Counsel objects to the introduction of that letter as immaterial and irrelevant. It has no evidentiary value whatever, and I have to object to that.

The COURT: What is the purpose of the letter?

Mr. ALLIN: The purpose of the letter is to show the evidence reflects the contention between the defendant
49 and the Department over the question of coverage, as to the date the letter is dated, continued violations prior to, and resulting in the filing of this suit seeking injunctive relief. It has some bearing.

The COURT: I overrule the objection. You may proceed.

ALGERION A. MABSON, Witness, being duly sworn on behalf of Plaintiff, was examined and testified as follows:

DIRECT EXAMINATION:

By Mr. ALLIN:

Q. Please state your name?

A. Algerion A. Mabson.

Q. Mr. Mabson, with whom are you employed

A. I am employed with the Corps of Engineers, New Orleans District.

Q. In what capacity?

A. I am Assistant Chief of the Engineering Division.

Q. In your capacity as Assistant Chief of the Engineering Division, do you have anything to do with the various construction contracts entered into between the Corps of Engineers and various contracts in the New Orleans District?

A. Yes, the plans and specifications for various projects are prepared in the engineering division, and the
50 work is processed and advertised, and the contracts awarded. Then all the details of the successful contract are handled by the construction division of the office, but the engineering division has to keep up to date with what is going on during construction.

Q. Have you prepared plans and recommendations for various projects?

A. Yes.

Q. Are you familiar, Mr. Mabson, with the construction project involving the Algiers Lock and Canal?

A. Yes, Sir.

Q. Are you familiar with Senate Document 188?

A. Yes, I am.

Q. Senate Document 188 was prepared and submitted in a report by the Chief of Engineers in 1944. Are you familiar in so far as this document is concerned, Mr. Mabson, with the reasons stated therein, as to an alternate canal at or near the Port of New Orleans, Louisiana?

A. Yes, I have read it.

Q. I ask you, Mr. Mabson, whether or not to your knowledge, in your capacity as Assistant Chief in the Engineering Division, if the reasons for the construction of the Algiers Lock and Canal, as stated in the House Document, are still valid today?

Objection:

51 Mr. LEAKE: I object to the question as entirely too broad to know whether it is valid or not valid.

The COURT: I think you had better rephrase your question.

By Mr. ALLIN:

Q. Mr. Mabson, did you have anything to do with the planning of this alternate route in 1944 when the Senate

had it under consideration, as shown in the Senate Document?

A. No, Sir. I was in the Navy at that time.

Q. You were in charge of the alternate route? You did have something to do with it?

A. Yes, Sir. I returned from Service at the end of 1945, and the first money appropriated for the construction work was 1946, and I was in charge of all planning from that time, from its inception, from its foundation on up, whatever necessary with reference to the document and plan, the program of construction, and also the funds for doing the construction work.

Q. In other words, predicated to some extent, on the information contained in the Senate Document?

A. Yes, Sir. That is correct.

Mr. LEAKE: I would like at this time to state Counsel has propounded an expert question. Counsel for respondent is not satisfied that he is fully qualified as an expert.
52 He is only working for the United States Engineers.

The COURT: You want the witness to answer now whether or not in his opinion the reasons given in Senate Document 188, for the construction of the alternate route are valid today?

Mr. ALLIN: Are valid today. I wish him to state whether or not the reasons stated in Senate Document 188 for the need of construction of the Algiers Lock and Canal, are still valid for those reasons suggested.

The COURT: Isn't this an alternate route or construction?

Mr. ALLIN: It has not been completed. It hasn't been opened to commerce.

The COURT: It is still under construction, but not open to commerce?

The WITNESS: Yes, Sir.

The COURT: I think it fair to assume the reasons stated in 188 are valid, or they would not have been proceeded with.

By Mr. ALLIN:

Q. Mr. Mabson, in your position in the Corps of
53 Engineers, is it necessary for you to, and are you in fact familiar with the Gulf Intracoastal Waterway as a whole?

A. Yes, Sir.

Q. How far does that waterway extend?

A. From my personal knowledge—I haven't been over all of it—but it is authorized from Florida to the Mexican

Border, and I know from reports it has been completed from Florida to the Mexican Border.

Q. Do you know when the Intracoastal Waterway Canal was first planned and authorized, and the extent of the waterway in so far as depth, width, etc., are concerned?

A. They were planned from a series of authorities. I don't remember all of the details. The first intracoastal waterway was started in about 1913, which was five foot depth by forty foot width, and then about 1925 the waterways were enlarged, and the dimensions were nine foot depth by ten foot bottom width. Then in 1942 there was a provision which increased the depth and the width to twelve foot depth and 125 foot bottom width. The project today from Florida in through Louisiana and Texas is twelve foot depth and 125 foot width of the bottom.

Q. What is the purpose of these revised plans?

Mr. Leake: Which revised plans?

54 Mr. Allin: The witness has testified that there have been several changes in the project as far as depth and width.

The Court: What Counsel wants to know is, why the waterway was increased in size, depth and width.

Objection:

Mr. Leake: Unless the witness is qualified to know more about it than he has testified, I object.

The Court: I believe he is in as good position as anybody to testify to the reasons why they depended the channel. I overrule the objection. Answer the question.

A. In the engineering division we have a report section which studies the various projects. In fact, we have one now for study for further enlargement. The 5 x 40 was changed to 9 x 100, because of the increased use of the waterway. As commerce develops, the number of vessels, barges, sizes, increase, it is necessary to provide for increased width. The change from 9 x 100 to 12 x 125 was solely made to decrease the friction on the vessels passing through the waterway, so as to take less power to push the boats through the waterway, and the present study now is to increase it to a fifteen foot depth by three feet wider.

By Mr. Allin:

Q. I understood you to testify, Mr. Mabson, that

55 the plan being made now was being studied for

further improvements to the canal and Coastal Waterways?

A. Yes, Sir.

Q. In other words, that is a constant project with the Corps of Engineers, to make various plans to improve the waterways for the purpose of interstate commerce?

A. No——

Objection:

Mr. LEAKE: I object to that; getting very broad. It is slightly leading. I object.

The COURT: Rephrase your question.

By Mr. ALLIN:

Q. Mr. Mabson, the Corps of Engineers is constantly concerned——

The COURT: Just a minute——

Mr. LEAKE: You are leading him again.

By the COURT:

Q. What is the Corps of Engineers connection with this Intracoastal Waterway?

A. The Corps of Engineers act as agents of the government for constructing projects authorized by Congress. Also the Corps of Engineers make studies that are
56 not authorized by Congress. We don't initiate any studies on your own. Those are all requested by Congress.

Q. In other words, if Congress in it's wisdom feels further construction, or enlargement of the waterway is necessary, the Corps of Engineers have instructions adopted by Congress to effect it's plans?

A. Yes, Sir, and generally the procedure is the local people through their Congressmen get the Corps of Engineers to make a study. Then the Corps of Engineers make a study to find out what they want, and make a report which may be favorable or unfavorable, and that is passed to Congress and Congress acts on it, and in turn authorizes it or not as they see fit.

By Mr. ALLIN:

Q. Mr. Mabson, are you familiar with whether or not the present facilities of the Port of New Orleans, in so far as

east-west and west-east traffic is concerned, are adequate or not?

Objection:

Mr. LEAKE: I object to the question as a very broad question to answer, whether it is adequate or not adequate. No foundation has been laid for that testimony. This gentleman hasn't testified he is familiar with the Statutes involved, or studied any of them.

The COURT: Ask the witness if Congress has au-
57 thorized the Corps of Engineers to make any study, or increase the Intracoastal Waterway in any way.

By Mr. ALLIN:

Q. Mr. Mabson, does the Corps of Engineers have personal authority from Congress to make any study with reference to improvement of Gulf Intracoastal Waterway's facilities?

Mr. LEAKE: The words "improvement of Gulf Intracoastal Waterway", is really going to require technical meaning, and is a question of law which this Court has to decide. I don't want the record to show the witness is testifying that he knows something is an improvement, which the Court will have to decide. He cannot testify to a question of law.

The COURT: Change the word "improvement" and make it "change".

Q. Can you answer that question?

A. Yes, Sir. We have been directed by Congress to make a study to determine whether there should be any change in the present dimensions of the Intracoastal Waterway.

By Mr. ALLIN:

Q. At and in the vicinity of the Port of New Orleans?

A. It is not specifically designed or limited. It is throughout Louisiana and Texas.

58 Q. Have you, in connection with that authority and direction, made any particular study with reference to the facilities at or near, or in the vicinity of the Port of New Orleans?

A. The present study is going on. It has not been completed. It is a matter of opinion, which you may not want. The Harvey Canal is so highly industrialized that the indus-

trial area will physically limit what the practical accomplishments can attain.

Q. What do you mean by that?

A. The Waterway people, local interests we refer to, have asked for a widening of the waterway to 300 feet. When you take the vicinity of New Orleans, meaning say Harvey Canal, every industry is located right on the bank of Harvey Canal, and it would be extremely expensive to widen Harvey Canal; would have to move all of the industries, so to that extent it would be impractical to widen Harvey Canal. It may be possible to deepen it somewhat. The studies have not been completed that far.

Q. Mr. Mabson, in connection with this study and direction of Congress, have you concerned yourself with the volume of traffic utilizing Harvey Canal, the number of lockages, and matters of that nature?

A. We have to weigh the costs against the benefits, involving the number of vessels, the tonnage they han-
59 dle, the saving in time. We haven't completed the study yet.

Q. In your study have you found that the Harvey Lock and Canal——

A. I might try——

Q. Just a minute. Has your study revealed whether or not the Harvey Lock and Canal is capable of handling all traffic desiring to utilize the Gulf Intrastate Waterway?

Objection:

Mr. Leake: I object. All traffic designed to utilize the Gulf Intrastate Waterway would include, I would say, every barge and tug in the United States, which by it's dimensions and draft could navigate the canal. The question is entirely too broad. The man testified the study was not completed yet.

Mr. Allin: Counsel misunderstood the question. Desire to use, not designed.

Mr. Leake: It is still too broad.

By the Court:

Q. As I understand it, what this case is about, is for an alternate route on the Intracoastal Canal?

A. That is what I understand.

Q. And you are building that?

A. Yes, Sir. It is under construction.

60 Q. Why are you building it?

A. We were directed by Congress to do that.

Q. Was it built on the recommendation of the Corps of Engineers, of which you are a part?

A. Public Law 14 by Congress adopted the project as represented by Senate Document 188.

Q. And the reason for building it is predicated on the recommendation of the Corps of Engineers?

A. Yes, Sir.

Q. What was the recommendation of the Corps of Engineers?

A. Fundamentally, it was readily seen during war times and also subsequent studies have shown that on a long time basis, Harvey Lock and New Orleans could not handle it's traffic without excessive delays, and it was readily seen that additional facilities were necessary. As a matter of fact, in the studies presented to Congress, when Harvey Lock was originally built in 1934, it was seen as a traffic increase, and it would be necessary to build a parallel lock to Harvey Canal. As time went on and it was seen that traffic increased to the point where an additional lock was needed, a study was made, and resulted in the determination that a lock was needed, and then the question was where the lock should be, as to whether it should be upstream or downstream, and that is the reason for the additional
61 recommendation to the Senate Document. If a lock was put downstream, the traffic coming out of the lock could proceed through the Industrial Lock, and would not have to pass through the harbor of New Orleans where ship traffic is rather dense.

That was one of the reasons in a subsequent review of the report in 1946 where the people of Westwego tried to have a lock located there, but in the study it was found though the lock could be built in Westwego, it would be better to put it at Algiers.

Q. For the purpose of the record will you state just what is the alternate route of the waterway, what purpose does it serve? Take a vessel coming east through Louisiana. It would enter on the Intracoastal Waterway. It would enter Harvey Lock at Harvey, Louisiana, generally speaking?

A. I lost the trend of that a minute ago. West or east?

Q. Coming east through Louisiana.

A. That is correct. At the present time it would have to go through Harvey Lock to enter the Mississippi River.

Q. And enter the Mississippi River where?

A. At Harvey, Louisiana.

Q. Under the alternative route which is under construc-

tion now, and what this case is about, where would the
62 vessel coming east through Texas into Louisiana, what would it do? As I understand it, they have a choice of either going through the Harvey Lock or going through the alternate route?

A. Yes, Sir.

Q. Assuming he goes through the alternate route, where would he enter the Mississippi River?

A. He would enter the Mississippi River from Algiers, which is about ten miles downstream from Harvey, Louisiana, what they call Cut Off, Louisiana. This is a part of Orleans Parish, and it would be a little bit downstream from the Industrial Canal Lock.

To follow on through with what Your Honor had in mind, if in the future, the way I conceive it, a barge coming west approaches the Mississippi River, it will have the choice of either going to the Mississippi River through Harvey Lock, or through Algiers Lock, as we call the other one, and we believe that choice will be adopted by traffic coming through, whether or not the barge is going straight through, and continue to the east. If it continues on to the east, we believe his choice will be to go through Algiers and cross the river, go through the Industrial Canal Lock and continue on east to Mississippi, Alabama and Florida.

If the barge is going upstream from New Orleans,
63 say going to Donaldsonville or Baton Rouge, we believe when he approaches the Mississippi River, his choice would be to go through the Harvey Lock and proceed upstream, with one exception. We believe the larger boats going upstream will take the new lock, because some of the barges now in a tow have to double trip, can't get them through together. We believe they will be able to in the new lock.

Objection:

Mr. Leake: I meant to make an objection earlier to the Court's preceding questions. I didn't want to interrupt. The first statement concerning instructions and what they were intended for, the testimony is the rankest hearsay, because he was in the Navy at the time and did not return to the Corps of Engineers until after all this occurred.

The Court: Mr. Leake, I don't think you are suggesting what the witness said is not true. You know as well as I do it is absolutely correct.

Mr. Leake: To a certain extent it is.

By Mr. ALLEN:

Q. Mr. Mabson, are you familiar with the type of cargo predominently carried by barge traffic coming west to east on the Gulf Intracoastal Waterway through Harvey Lock?

A. Yes, Sir, from visual observations as well as
64 the report of the lock master, the largest percentage is the oil traffic, petroleum products.

Q. Does that include all types of petroleum products and crude oils?

A. Yes, Sir?

Q. You know what percentage the petroleum cargo constitutes?

A. No, Sir. That varies from time to time. I don't know what it is at present.

Q. Mr. Mabson, traffic utilizing Harvey Lock at the present time, and destined for Mobile, for instance, will you describe the route it must take at the present time from Harvey Lock to Mobile?

A. Traffic on the Intracoastal approaches the Mississippi River through the Harvey Locks, and then enters the Mississippi River, goes downstream to the Industrial Canal Lock and through the Industrial Canal Lock, proceeding to the east to Mississippi and other States.

Q. Is there any hindrance to navigation in the stretch of the present route in the Intracoastal Waterway, between Harvey Lock and the Industrial Lock?

The COURT: You mean the Port of New Orleans?

Mr. ALLEN: I don't have that specifically in mind.
65 Geographically speaking.

A. Well, the Mississippi River—New Orleans is called the Crescent City—the Mississippi River has some curve between Harvey Lock and the Industrial Canal Lock, if that is what you mean.

Q. Is there one particular point that you know of?

A. At Algiers Point, which is just past Canal Street, the Mississippi River makes a ninety degree turn, and during high stages of the Mississippi River it is rather hazardous to navigate around the point. We operate traffic lights on the Mississippi River whenever the stages on the Carrollton gauge are twelve feet or above. We have traffic lights, and have men there for twenty-four hours a day to see that only one ship or vessel at a time rounds the Point. The green light is normally on for downriver traffic, and whenever a barge or tow wants to proceed upstream around Algiers

Point, they have to check the light and turn the red light to downriver traffic so the upriver traffic can proceed. We operate that every time the river gets above twelve feet, or rising stage of the river, and stop when it reaches fifteen or falling stage. The reason for the two differences, the river is more dangerous on twelve feet rising than on falling at fifteen feet.

Q. Does that create any particular danger in so far as barge traffic is concerned?

66 Objection:

Mr. Leake: This witness is no navigating expert apparently. If he wants to qualify him to testify as a navigating expert, it is quite all right. It is also leading.

The Court: The Court will take cognizance of the fact Algiers Point in the river is a very dangerous and hazardous condition, and Algiers Point has been the scene of many, many very serious marine casualties. Let's proceed.

By Mr. Allin:

Q. Upon completion of the Algiers Lock and Canal, and particularly during flood stages on the Mississippi River, is it the plan of the Corps of Engineers and those in charge of operating and controlling contracts in that area of the Port of New Orleans, to ultimately complete the Algiers Lock and Canal, rather than the Harvey Lock?

Objection:

Mr. Leake: Objected to as leading.

The Court: It is leading. I think the witness has testified what use the Algiers Lock would be put to; will probably use the Algiers Lock going east. In any event would use the Algiers Lock, because it would avoid the City of New Orleans.

67 Mr. Allin: I think that is rather repetitious, Your Honor. I just wanted to get that in. I believe that is all.

Cross-Examination.

By Mr. Leake:

Q. How long have you been with the Corps of Engineers?

A. Since February, 1931, with exception of a period in the War Service.

Q. And that was actually what year?

A. My War Service was from July, 1943 to December, 1945.

Q. How long have you been on the staff in New Orleans with the Corps of Engineers?

A. I say with some breaks, not continuously. I started in New Orleans in 1931 until 1936, when I was transferred to the Mineral Wells Texas District. I came back to New Orleans in 1937 and stayed in New Orleans until the early part of 1943 when I went to the Service and stayed from April, 1943 to July, 1945, and after coming out of the Navy I returned to New Orleans, and have been here since.

Q. Just what is your experience? Do I understand you are a graduate engineer?

A. Yes, Sir. I graduated from Tulane and am a registered engineer in the State of Louisiana.

Q. Is your work designing or drafting? What is your work?

68 A. Well, at present I am in what might properly be termed Supervisor, or executive capacity. Previously I had been in the designing. In 1946 when this particular alternate route was initiated, I was in direct immediate charge, and responsible for all the designing of this particular project.

Q. On this project itself?

A. Yes, Sir.

Q. You have nothing to do with the construction end?

A. No, Sir.

Q. Your job is making up plans, to see that from a specification standpoint the plans are sound?

A. Yes. When you say they have nothing to do with construction, the administrative feature of it, we are charged with the responsibility to make occasional inspections to see that the design is carried out, and look after the maintenance work.

Q. In your department that you have been with since 1945 forward, does it have anything to do with making these surveys of the canals and these various engineering projects around this area?

A. Yes, Sir. In other words, it is called the engineering division.

Q. You yourself have nothing to do with the particular research and surveys on the Algiers Lock project

69 now?

A. This Senate Document 188 you are apparently referring to?

Q. Yes.

A. No, Sir.

Q. Have you read Senate Document 188?

A. Yes, Sir.

Q. When was the last time you read it?

A. Well, I would say from one end to the other along about 1947. I reviewed it just this morning, a few passages of it.

Q. So actually, you are very familiar with the construction itself of this new canal and lock?

A. Yes, Sir.

Q. Have you ever read or examined the construction contracts that have been let for this work on the canal and lock?

A. Yes, Sir. As a matter of fact, I wrote some of them.

Q. You know then that there are a number of contracts?

A. Yes.

Q. For different phases of the work?

A. Yes, Sir.

Q. Isn't it true, Mr. Mabson, that the fund for all of those contracts, is expressly subject to continual appro-
70 priation by Congress?

A. I can't answer it broadly. I have to answer it in detail.

Q. All right, Sir.

A. The contracts that we had at the time, the money had been appropriated by Congress. We had the funds in hand. There wasn't any question about the completion of the contracts. There were other contracts that we had, such as bridges, that we didn't have sufficient funds from Congress, and those particular ones were what we call continuing contracts. There is a clause in the contract saying that completion is subject to appropriation by Congress. I don't recall this particular contract offhand, whether it was a continuing contract or not.

Mr. Leake: May I ask the Court for the plaintiff's exhibit, which is the contract?

The Court: (The Court hands document to Mr. Leake).

The Witness: It comes under the limit clause.

By Mr. Leake:

Q. I would like to show you page nine of Plaintiff Exhibit-7, which is the production contract involved in this case. You see the subsection of Section F(c). Look-
71 ing at the contract and provisions of sub-section F(c)-(4), isn't it true this particular contract was con-

tingent upon the completion of continuing appropriations by Congress?

A. Yes, Sir. That is correct.

Q. Isn't it true that from time to time the Corps of Engineers have received authority to make constructions and started the construction of them, and then abandoned them for lack of appropriations?

A. To my knowledge that has never happened.

Q. Are you familiar with the proposed canal the United States Engineers was to construct in the early Thirties, known as the Florida Ship Canal?

A. Yes, Sir.

Q. That canal was designed to provide a canal through the northern part of Florida?

A. Yes, Sir.

Q. And that canal was actually started by the Engineers?

A. Yes, Sir.

Q. And it was abandoned?

A. Yes, but I don't believe the contract was a continuing contract.

Q. But in any event, it was abandoned?

A. Yes, Sir.

Q. The same thing is true currently with reference
72 to the Pontchartrain Protection Levee, which the United States Engineers have?

A. No, Sir, not unless you enlarge your question.

Q. That project has been started and some work done on it?

A. Yes, Sir.

Q. And currently appropriations have been continued for the completion of it?

A. No, Sir.

Q. I may be wrong.

A. It is a rather involved discussion. If you want to go through with it, I will go through with it, but I think you are getting off on the wrong angle. The original work was started in what is called a flood control general project. That was authorized by Congress. All the funds were appropriated. All the work was done as contemplated by the original project.

Subsequent to that a modification of the project was authorized by Congress, and in authorizing the enlargement of the project, the project was immediately changed from a flood control general project to come under flood control of Mississippi River and tributaries. The modification of the original project is considered by Congress as a new

start, and for that reason under the policy set up by Congress in the last four years, they have not author-
73 ized any work or any new starts for any projects, and that is the reason there is no additional authorization for that, because it is a new start. I might say the local people don't understand it either.

Q. Now Mr. Mabson, a vessel proceeding northwest on the Intracoastal Canal has a choice of two canals which they may take, the Plaquemines and the Harvey?

A. They have three choices. Assuming a boat originates west of Morgan City, they could go the Atchafalaya River or Plaquemines route, or proceed to Harvey, and come through Harvey.

Q. What is the length of the Plaquemines Canal?

A. I don't recall. It is something like 100 miles. It is much shorter that way than to Harvey.

Q. That was constructed subsequent to the construction of Harvey?

A. No, Sir, the other way around. Plaquemines was constructed in 1909 and the present Harvey in 1904. There was an older Harvey prior to 1904.

Q. The project with which we are now concerned involves far more than the construction of a lock?

A. Yes, Sir.

Q. The project as a whole is constructed of a canal some nine miles long. Is that right?

A. Yes, Sir.

74 Q. The realignment of the Mississippi River levees at that lock?

A. Yes, Sir.

Q. The construction of guide levees to the new canal and land elevation in the canal?

A. Yes, Sir.

Q. Facing on either side of the locks?

A. Yes, Sir.

Q. And re-location and re-construction of bridges and entrances which open across the rights-of-way to the canal?

A. Yes, Sir.

Q. All of those projects have not been finished?

A. No, Sir.

Q. Have all of the contracts been actually let?

A. No, Sir.

Q. The canal itself is not open to traffic, is it?

A. No, Sir.

Q. It cannot be used in commerce right now, can it?

A. No, Sir, not in the usual sense.

Q. At the present time, the lock structure is not 100 percent finished, is it?

A. No, Sir.

Q. The earthwork levee leading from the lock structure to the Mississippi River levees in Algiers have not been tied in with those levees?

75 A. No, Sir.

Q. Various work is to be done on those levees before operating?

A. Yes, Sir.

Q. As a matter of fact, they are not up to grade?

A. No, Sir.

Q. Another contract will have to be let for that work?

A. Yes, Sir.

Q. To your knowledge, does the Corps of Engineers have Congressional appropriations earmarked for that work?

A. Yes, Sir.

Q. You are familiar with the contract in this particular case?

A. Yes, Sir.

Q. The contract has solely to do with that lock structure and the levees leading from that to the Mississippi River, that we have just discussed?

A. Yes, the backfill of the lock structure.

Q. And before the work which was accomplished under this contract can be put in operation, there must be another contract let for additional work on the same object or construction. Is that right?

A. Yes, Sir. When you say additional contract, it might be more accurate to say additional work. It is con-

76 ceivable the government may perform it with it's own force.

Q. The canal itself is not completely dredged, is it?

A. No, Sir.

Q. Now until the project is completed, it can not be used as a part of the Gulf Intracoastal Waterway canal, can it?

A. No, Sir.

Q. Assuming that it is completed, and assuming it is placed in order, so far as your knowledge extends, there is no plan to abandon the Harvey Lock or Harvey Canal, is there?

A. No, Sir, none whatsoever.

Q. Are there current plans, or at least a survey, so far as you personally know, towards the further improvement of the Harvey Canal and the Harvey Locks, that is, the locks themselves, through another lock on the Harvey Canal, or enlargement of the lock, or deepening of the Harvey Canal?

A. You are separating two parts. There is no study of the lock itself. The study was by Congress to deepen and enlarge the canal.

Mr. LEAKE: That is all. Thank you Mr. Mabson.

REDIRECT EXAMINATION.

By Mr. ALLIN:

Q. Mr. Mabson, at the present time work is being done under the contract on the Algiers Lock and Canal?

77 A. Yes, Sir.

Q. When is it contemplated, so far as the Corps of Engineers is concerned, what is the contemplated completion date?

A. The present plan at the end of December, 1954.

Q. In so far as you know, do you consider that a reasonable date?

A. Yes, Sir, we consider it reasonable.

Q. And the other contracts with reference to portions of the canal that Mr. Leake interrogated you about, will be let from time to time?

A. Yes, Sir.

RECROSS-EXAMINATION.

By Mr. LEAKE:

Q. That is, Mr. Mabson, if Congress appropriates the funds to cover?

A. Yes, Sir, entirely dependent upon that.

Q. And if Congress doesn't appropriate the funds, the contract won't be let?

A. We will have to wait.

Q. And the Corps of Engineers has no control over the funds?

A. No, Sir.

Mr. LEAKE: That is all.

78 Mr. ALLIN: Plaintiff rests.

79 TESTIMONY ON BEHALF OF DEFENDANT:

CLARENCE VOLLMER, Witness, being duly sworn on behalf of defendant, was examined and testified as follows:

DIRECT EXAMINATION:

By Mr. LEAKE:

Q. Please state your name?
A. Clarence Vollmer.
Q. Please state your business?
A. Contractor.
Q. What is the name of your company?
A. Clarence W. Vollmer & Company, Inc.
Q. What is your position with the company?
A. I am President of it.

Q. In your capacity as President of Clarence W. Vollmer & Company, what connection, if any, did you have with the performance of the construction contract on the Algiers Lock in the Parish of Orleans?

A. I prepared the bid and supervised the work and completed the project.

Q. Have you ever examined the situs of the work?
A. Yes, Sir, at the time of bidding.

Q. Since?
A. Yes, Sir.

Q. Do you know where the physical location of the Mississippi River in the vicinity of New Orleans is?

80 A. Yes, Sir, I do.

Q. And do you know the present physical location of the Gulf Intracoastal Waterway Canal in the vicinity of New Orleans?

A. Yes, sir.

Q. During the time in which your company was engaged in this work on the Algiers Lock, will you please state what connection, if any, the lock or the canal for which the lock was destined, had with either the Mississippi River or the Gulf Intracoastal Waterway Canal?

A. At the time our contract was let, and we started on our portion of the work, the only thing constructed at the Algiers Locks, were the locks, the concrete work, with the exception of the gates; no canals on either end, north end or south end. The locks set out in the swamps, and our contract was to build guide levees on the Mississippi River on the east end, and backfill the lock. When we completed our contract, during the interim, a contract had been let

for about a mile and a half for a new operation on the east end from the lock to the Mississippi River, and nothing done to it. We had the guide levee at the east end of the lock to the Mississippi River, and built a guide levee to the two stations down on the south end.

Q. Two stations about 200 feet?

A. A couple of hundred feet, yes.

81 Q. Was the performance of your contract ever formally accepted by the United States?

A. Accepted by the Corps of Engineers.

Q. I would like to ask you if you can identify the document which I now show you?

A. Yes, Sir.

Q. What is that?

A. Acceptance formally by the Corps of Engineers, New Orleans District.

OFFER: Mr. LEAKE:

In connection with the testimony of the witness I offer and file in evidence as D-1, the letter dated 23 January, 1953.

Q. Will you please state whether or not the Corps of Engineers examined the operations, or made any comment or whatever they did, of the payroll records on this particular contract?

A. We furnished the Corps of Engineers with the necessary copies they requested, sometimes one, two or three. In this particular case three copies were furnished, one at the field office, two at the foot of Prytania Street, with form of affidavit certifying them and I don't think we had a mistake or correction of any kind on the payrolls. It was in compliance with the demands of the contract.

Q. Answer any questions Mr. Allin will ask you?

82 A. Yes, Sir.

Mr. ALLIN: No questions.

Mr. LEAKE: As a further part of the defendant's case, Counsel would like to offer, introduce and file in evidence, the Answer, D-2; the objection to interrogatories filed by respondent on or about October tenth, marking it D-3; the objection to the requests for admissions filed by respondent on or about the third day of January, marked D-4.

I might suggest I have no objection to the offer of the substitution of Mr. Durkin as plaintiff.

That is the defendant's case, Your Honor.

Mr. ALLIN: Plaintiff rests.

83 OPINION OF THE COURT—Filed June 25, 1953

(Number and Title Omitted)

Earl Street, Regional Attorney.

T. Hogan Allin, Harry Campbell, Attorneys for Plaintiff.

Deutsch, Kerrigan & Stiles, Robert E. Leake, Jr., Attorneys for Defendant.

WRIGHT, District Judge:

Plaintiff brings this action seeking to enjoin the defendant from violating the provisions of Sections 7 and 11(c) of the Fair Labor Standards Act [1] relating to the non-payment to employees of overtime and failure to keep proper employee work records. The question presented is whether the defendant's employees are "engaged in commerce" within the meaning of Section 7(a) of the Act.

The defendant entered into a contract with the United States through the Corps of Engineers, Department of the Army, under the terms of which defendant agreed to construct an earth-work embankment and concrete platform for Algiers Lock, Orleans Parish, Louisiana. Algiers Lock is part of the proposed Algiers Lock & Canal. Algiers
84 Lock and Canal will be a part of the Gulf Intracoastal Waterway and will serve as an alternate lock and canal connection with the Mississippi River in the vicinity of the Port of New Orleans. The present connection in that vicinity, Harvey Lock and Canal, is proving inadequate alone to handle the volume of traffic in the Gulf Intracoastal waterway.

The Gulf Intracoastal Waterway from Apalachee Bay, Florida, to the vicinity of the Mexican Border is an instrumentality of interstate commerce and is regularly navigated by vessels and barges in transporting goods in interstate commerce. At the present time eastbound navigation on the Gulf Intracoastal Waterway enters the Mississippi River from the Harvey Lock and Canal and then proceeds down river 5.5 miles to the Industrial Lock and Canal where it leaves the river. Westbound navigation, of course, reverses this procedure. The stretch of 5.5 miles in the Mississippi River is through the harbor of New Orleans where intracoastal traffic must compete with ocean-going traffic for room to navigate. In addition, the banks of the river on both sides are highly developed with commercial facilities including docks and wharves serving the Port of New Orleans.

[1] 29 U.S.C. § 201 et seq.

Further, there is along this stretch Algiers Point, which marks an acute bend in the river. The navigation of this point by both ascending and descending traffic is particularly difficult because of the swift current moving down river.

The current federal project for intracoastal waterways, as outlined in Senate Document 188,[2] includes, in addition to the construction of Algiers Lock and Canal, the improvement, enlargement and extension of the Gulf Intracoastal Waterway by increasing its present depth and width and extending it west and south to the Mexican Border. This project also covers the cutting of a canal through northern Florida thereby connecting the Gulf Intracoastal Waterway with the Atlantic Intracoastal Waterway. The
85 completion of the project depends on the continued appropriation of federal funds.

Algiers Lock and Canal, which has not been completed, is entirely new construction. The proposed nine mile canal does not follow any pre-existing right of way and, when completed, will not replace any existing canal or other navigable waterway. As has been stated, it will simply be an alternate route for entering the Mississippi River from the west and leaving it from the east. Its primary purpose in addition to relieving the congestion which now obtains in Harvey Lock and Canal, will be to eliminate the necessity of Gulf Intracoastal Waterway traffic navigating the 5.5 miles of the Mississippi River through the crowded harbor of New Orleans and around treacherous Algiers Point.

The government alleges that Algiers Lock and Canal is merely an improvement of the existing waterway being constructed pursuant to the over-all project for the improvement and enlargement of the intracoastal waterways of the United States as outlined in Senate Document 188. As such, the government contends, the employees working on the construction of the Algiers Lock are "engaged in commerce" or so closely connected thereto they are covered by the Fair Labor Standards Act. The defendant on the other hand maintains that the building of Algiers Lock is new construction and therefore employees concerned with the building of the lock are not covered.

The question presented here for adjudication is an extremely narrow one. It is clear that persons engaged in the maintenance and repair of interstate instrumentalities are within the coverage of the act. *Overstreet* v. *North Shore Corp.*, 318 U. S. 125; *Pedersen* v. *J. F. Fitzgerald Construction Co.*, 318 U. S. 740, 324 U. S. 720; *Alstate Con*

[2] 78th Congress, 2nd Session.

struction Company v. *Durkin*, 345 U. S. 13; *Thomas* v. *Hempt Bros.*, 345 U. S. 19. It is likewise clear that persons engaged in the construction of new interstate instrumentalities are not covered by the act. *Raymond* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 243 U. S. 43; *J. F. Fitzgerald Company* v. *Pedersen*, 324 U. S. 720; *Nieves* v. *Standard Dredging Corporation*, 152 F. 2d 719 (CCA 1); *Laudadio* v. *White*
86 *Construction Company*, 163 F. 2d 383 (CCA 2); *Reed* v. *Murphey*, 168 F. 2d 257 (CCA 5); *Scholl* v. *McWilliams Dredging Company*, 169 F. 2d 729 (CCA 2); *Koepfle* v. *Garavaglia*, 209 F. 2d 191. Consequently, does the building of Algiers Lock and Canal amount to maintenance and repair of the Gulf Intracoastal Waterway or is it new construction as defined in the cases cited?

Although the government argues that the Algiers Lock and Canal is merely an improvement of the existing waterway, no cases are submitted which hold that improvement of an interstate instrumentality through the construction of a new or alternate route is covered by the act. All of the government cases relate to the improvement of an existing instrumentality by the construction of revetments and the like in the instrumentality itself. *Walling* v. *Patton-Tulley Transportation Co.*, 134 F. 2d 945; *Bennett* v. *V. P. Loftis Co.*, 167 F. 2d 286 (CCA 4); *Schmitt* v. *War Emergency Pipelines*, 175 F. 2d 335 (CCA 8); *Tobin* v. *Pennington-Winter Const. Co.*, 198 F. 2d 334 (CCA 10); *Ritch* v. *Puget Sound Bridge & Dredging Co.*, 156 F. 2d 334 (CCA 9); *Walling* v. *McCrady Const. Co.*, 156 F. 2d 932 (CCA 3).

It is true that the Supreme Court has held that the provisions of the Fair Labor Standards Act should be liberally construed in order to carry out the basic social purpose of the act. *Tennessee Coal Company* v. *Muscoda Local No. 123*, 321 U. S. 590, 597. However, in 1949 Congress, apparently motivated by a feeling that the courts had gone too far in extending coverage, amended the act limiting the coverage to some extent. Amendment of Oct. 26, 1949, Chapter 763, Section 3, 63 Stat. 911, 29 U.S.C. § 203(j). Statement of House Conferees, Report No. 1453, 81st Congress pp. 14-15. While the amendment does not bear on the point at issue here, nevertheless, it does show that Congress in passing the Fair Labor Standards Act did not intend that coverage under the act would be co-extensive with the power of Congress to control interestate commerce. This fact has been recognized by the courts. *Kirschbaum Co.* v. *Walling*, 316 U. S. 517; 523; *Walling* v. *Jacksonville Paper Co.*, 317
87 U. S. 564. Under the test for coverage as judicially determined the work in question must either be "in commerce" or so closely connected thereto as to be

a part thereof. *Pedersen* v. *Delaware L. & W. RR.*, 229 U. S. 146; *Overstreet* v. *North Shore Corp.*, supra.

In applying this rule, the Wage and Hour Division itself draws a distinction between original construction and repair or reconstruction.[3] The recognition by the Division that new construction is not covered by the act, while not controlling, is highly persuasive. *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, n. 129; *Koepfle* v. *Garavaglia*, 200 F. 2d 191, 193. Unless the fact that the Algiers Lock and Canal will become a part of an existing waterway after it is completed makes the building thereof "repair or reconstruction", under the Division's own interpretation, defendant's employees are not covered by the act.

Since there is no authoritative holding respecting coverage under the Fair Labor Standards Act of work performed in the construction of an alternate route for an existing interstate instrumentality, guidance may be sought from decisions interpreting coverage under the Federal Employers Liability Act.[4] *Overstreet* v. *North Shore Corp.*, supra. So doing, there is the case of *Raymond* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, supra, in which the railroad, an inter-

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[3] In the Wage Hour Manual, Bureau of National Affairs Labor Relations Reporter, Volume 6, the rule is interpreted as follows:

10:237:

"In interpreting the Act's application to the employers in the building and construction industry, the Wage and Hour Division and the courts have drawn a distinction between the original construction of buildings or facilities and the repair or reconstruction."

10:238:

"The distinction between original construction and repair or reconstruction has also been recognized by the numerous lower federal and state courts which have decided cases involving the Act's covering of building and construction operations."

Wage and Hour Division Bulletin No. 5 of October, 1940, page 7, paragraph 12 reads as follows: "The employees of local construction contractors generally are not engaged in interstate commerce and do not produce any goods which are shipped or sold across state lines. Thus it is our opinion that employees engaged in original construction of buildings are not generally within the scope of the Act, even if the building when completed will be used "to produce goods for commerce."

[4] Before the 1939 amendment to Federal Employers Liability Act expanded coverage under that Act. 53 Stat. 1404; 45 U.S.C. § 51; *Overstreet* v. *North Shore Corp.*, *supra*.

state carrier, was engaged in construction of a tunnel for the purpose of "shortening its main line and making more efficient and expeditious its freight and passenger service." One of its employees was injured in the construction of the tunnel and filed suit under the Federal Employers Liability Act. At the time of the injury the tunnel was not complete and was not connected with the main line of the railroad. In denying recovery, the Supreme Court held "it is certain that Raymond and the railroad company were not engaged in interstate commerce at the time the injuries were suffered".

The new construction doctrine[5] of the Raymond case has been applied in cases brought under the Fair Labor Standards Act and it would seem that the principles there announced are applicable here. *J. F. Fitzgerald Company* v. *Pedersen*, supra; *Nieves* v. *Standard Dredging Corp.*, supra; *Landadio* v. *White Const. Co.*, supra; *Reed* v. *Murphey*, supra; *Scholl* v. *McWilliams Dredging Company*, supra; *Koepfle* v. *Garavaglia*, supra. If the government were simply building a canal which, when completed, would connect two interstate waterways, it would hardly be asserted that the work on such construction was within the coverage of the act. The mere fact that the Algiers Lock and Canal, when completed, will become a part of the integrated system of inter-coastal waterways of the
89 United States should not change this conclusion.

Until the Algiers Lock and Canal is dedicated to and used for interstate commerce, it cannot be said that the work thereon is "in commerce" or so closely connected thereto as to be a part thereof. As a matter of fact, should Congress fail to appropriate the necessary funds, Algiers Lock and Canal will never be completed and consequently it would then never become an artery of commerce. See *Parham* v. *Austin*, 158 F. 2d 566 (CCA 5).

Judgment accordingly.

(8) J. Skelly Wright,
United States District Judge.

New Orleans, Louisiana, June 25th, 1953.

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[5] The new construction doctrine was first recognized in *Pedersen* v. *Delaware L. & W. RR.*, 229 U. S. 146, at page 152:

> "Of course, we are not here concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such."

90 JUDGMENT DISMISSING SUIT AT PLAINTIFF'S COST—filed July 9, 1953

(Number and Title Omitted)

This cause came on for hearing on June 5, 1953.

PRESENT:

Harry Campbell, Jr., Esq., T. Hagan Allin, Esq., Attorneys for Plaintiff.

Messrs. Deutsch, Kerrigan & Stiles, Robert E. Leake, Jr., Esq., Attorneys for Defendant.

The court having considered the pleadings and the evidence adduced and briefs filed by both parties, and having, on June 25, 1953, handed down its written opinion that the action should be dismissed:

It is ordered, adjudged and decreed that the within action be, and it is hereby, dismissed at plaintiff's cost.

New Orleans, July 7th, 1953.

J. SKELLY WRIGHT,
United States District Judge.

91 AMENDED JUDGMENT—filed July 20, 1953

(Number and Title Omitted)

The judgment heretofore entered herein on July 7th, 1953, is vacated and set aside, and the following judgment is now entered:

This cause came on for hearing on June 5, 1953.

PRESENT:

Harry Campbell, Jr., Esq., T. Hagan Allin, Esq., Attorneys for Plaintiff.

Messrs. Deutsch, Kerrigan & Stiles, Robert E. Leake, Jr., Esq., Attorneys for Defendant.

The Court having considered the pleadings and the evidence adduced and briefs filed by both parties, and having, on June 25th, 1953, handed down its written opinion that the action should be dismissed:

It is ordered, adjudged and decreed that the within action be, and it is hereby, dismissed.

New Orleans, July 20th, 1953.

(S) J. SKELLY WRIGHT,
United States District Judge.

92 NOTICE OF APPEAL—filed September 2, 1953

(Number and Title Omitted)

Notice is hereby given that Martin P. Durkin, Secretary of Labor, United States Department of Labor, plaintiff above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Court's final judgment and decree filed and entered in this action on July 27, 1953, denying plaintiff the injunction sought and dismissing the action.

STUART ROTHMAN,
Solicitor,
EARL STREET,
Regional Attorney,
T. HAGAN ALLIN,
Attorney,
United States Department of Labor.

Post Office Address: Earl Street, Regional Attorney, U. S. Department of Labor, 222 Fidelity Building, Dallas 2, Texas, or Office of the Solicitor, U. S. Department of Labor, Washington 25, D. C.

93 DESIGNATION OF CONTENTS OF RECORD ON APPEAL—Filed September 2, 1953

(Number and Title Omitted)

To the Clerk of the Above Named Court:

Pursuant to Rule 75(a) of the Federal Rules of Civil Procedure the plaintiff appellant hereby designates for inclusion in the record on appeal to the United States Court of Appeals for the Fifth Circuit, taken by notice of appeal filed on September 2nd, 1953, the complete record and all of the proceedings and evidence in this case.

STUART ROTHMAN,
Solicitor;
EARL STREET,
Regional Attorney;
T. HAGAN ALLIN,
Attorney,
United States Department of Labor.

Post Office Address: Earl Street, Regional Attorney, U. S. Department of Labor, 222 Fidelity Building, Dallas, Texas or Office of the Solicitor, U. S. Department of Labor, Washington 25, D. C.

CERTIFICATE

T. Hagan Allin, one of the attorneys of record for Martin P. Durkin, Secretary of Labor, United States Department of Labor, does hereby certify that he has served a true and correct copy of the foregoing Designation of Contents of Record on Appeal on Mr. Robert E. Leake, Jr., of the firm of Deutsch, Kerrigan & Stiles, attorney of record for defendant, by depositing same in the United States mail in a franked envelope addressed to him at his address of record in this case, on the 31st day of August, 1953.

T. HAGAN ALLIN.

94 MOTION AND ORDER TO TRANSMIT EXHIBITS IN ORIGINAL TO COURT OF APPEALS—Filed September 8, 1953

(Number and Title Omitted)

Plaintiff moves the Court for an Order transmitting to the United States Court of Appeals for the Fifth Circuit the originals of plaintiff's exhibits Nos. 6 (Senate Document No. 188, 78th Cong., 2d Session), 7 (Contract No. DA-16-047-eng-796), 8 (Plans for Earthwork and Emergency Dam Storage, Algiers Lock, Orleans Parish, Louisiana), 9 (Nine photostats reflecting commercial statistics, water-borne commerce on the Gulf Intracoastal Waterway between Appalachee Bay, Florida, and the Mexican Border), and 10 (Photostat entitled "Statement of Barge, Shallow Draft and other Commerce between Mississippi River and Gulf Intracoastal Waterway at Harvey, Plaquemine and Industrial Canal Locks, Louisiana"), introduced in evidence at the hearing in the above entitled and numbered action on June 5, 1953, for the following reasons:

Plaintiff has designated for inclusion in the record on appeal to the United States Court of Appeals for the Fifth Circuit, the complete record of all the proceedings, evidence and exhibits in the case, and the said exhibits are essential to the consideration of this case by the Court of Appeals, and the said exhibits are voluminous and bulky and the Clerk of this Court would necessarily encounter extreme difficulty in reproducing copies thereof due to lack of necessary facilities.

STUART ROTHMAN,
Solicitor;
EARL STREET,
Regional Attorney;
T. HAGAN ALLIN,
Attorney,
United States Department of Labor.

Post Office Address: Earl Street, Regional Attorney, U. S. Department of Labor, 222 Fidelity Building, Dallas 2, Texas or Office of the olicitor, U. S. Department of Labor, Washington 25, D. C.

95 ORDER

Now on this 9th day of September, 1953, the Court, being fully advised in the premises, finds and orders that the originals of plaintiff's exhibits Nos. 6 (Senate Document No. 188, 78th Cong., 2d Session), 7 (Contract No. DA-16-047-eng-796, 8 (Plans for Earthwork and Emergency Dam Storage, Algiers Lock, Orleans Parish, Louisiana), 9 (Nine photostats reflecting commercial statistics, water-borne commerce on the Gulf Intracoastal Waterway between Appalachee Bay, Florida, and the Mexican border), and 10 (Photostat entitled "Statement of Barge, Shallow Draft and other Commerce between Mississippi River and Gulf Intracoastal Waterway at Harvey, Plaquemine and Industrial Canal Locks, Louisiana"), introduced in evidence at the hearing in the above entitled and numbered action on June 5, 1953, should and shall be transmitted to the United States Court of Appeals for the Fifth Circuit as a part of the record on appeal.

J. SKELLY WRIGHT,
United States District Judge.

APPROVED:

T. HAGAN ALLIN,
Attorney for Plaintiff.
DEUTSCH, KERRIGAN & STILES,
ROBERT E. LEAKE, JR.,
Attorney for Defendant.
September 1, 1953.

96 CLERK'S CERTIFICATE

I, A. Dallam O'Brien, Jr., Clerk of the United States District Court for the Eastern District of Louisiana, do hereby certify that the foregoing 95 pages contain and form a full, true and complete transcript of the record in the cause entitled "Maurice J. Tobin, Secretary of Labor, United States Department of Labor vs. C. W. Vollmer & Company, Inc., a Corporation" Number 3280 of the Civil Action Docket of

this Court as made up in accordance with the Designation of Contents copied herein.

Witness my hand and the seal of said Court at the City of New Orleans, La., this 16 day of September, A. D., 1953.

A. DALLAM O'BRIEN,
Clerk.

[SEAL]

By (S.) ANDREW J. BACON,
Deputy Clerk.

64 In United States Court of Appeals

No. 14749

MARTIN P. DURKIN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

v.

C. W. VOLLMER & COMPANY, INC.

Minute entry of Order of Substitution

October 29, 1953

On consideration of the motion filed by appellant to substitute James P. Mitchell, Secretary of Labor, United States Department of Labor, as appellant herein in place of Martin P. Durkin, former Secretary of Labor, United States Department of Labor, resigned:

It is ordered that James P. Mitchell, Secretary of Labor, United States Department of Labor, be substituted as appellant herein in place of Martin P. Durkin, former Secretary of Labor, United States Department of Labor, resigned.

* * * * *

65 *Minute entry of argument and submission*

April 19, 1954

[Omitted in printing.]

* * * * *

66 In the United States Court of Appeals for the Fifth Circuit

No. 14749

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

C. W. VOLLMER & COMPANY, INC., APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

(June 30, 1954)

Before STRUM and RIVES, Circuit Judges, and DAWKINS, District Judge

Opinion of the Court

Filed June 30, 1954

PER CURIAM: We find ourselves in agreement with the views expressed by the learned district judge and approve his opinion reported in 113 F. Supp. 235, et seq. See also the later opinion of this Court in *Van Klaveren* v. *Killian-House Co.*, 210 F. 2d
67 510, and *Billeaudeau, et al.* v. *Temple Associates, Inc.*, No. 14,931, Ms., decided June 18, 1954. The judgment is therefore

AFFIRMED.

68 In United States Court of Appeals

No. 14749

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

v.

C. W. VOLLMER & COMPANY, INC.

Minute entry of judgment

June 30, 1954

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

69 [Clerk's certificate to foregoing transcript omitted in printing.]

70 Supreme Court of the United States

[Title omitted.]

Order extending time to file petition for writ of certiorari

Filed September 22, 1954

Upon consideration of the application of counsel for petitioner,
It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 5, 1954

HUGO L. BLACK,
Associate Justice of the Supreme Court of the United States.

Dated this 22d day of September 1954.

72 Supreme Court of the United States

No. 387, October Term, 1954

[Title omitted.]

Order allowing certiorari

Filed November 22, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE, 1954

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OCT 5 1954
HAROLD B. WILEY, Clerk

No. — 387

In the Supreme Court of the United States

OCTOBER TERM, 1954

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

C. W. VOLLMER & COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SIMON E. SOBELOFF,
Solicitor General,
Department of Justice, Washington 25, D. C.

STUART ROTHMAN,
Solicitor, Department of Labor, Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. —

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

C. W. VOLLMER & COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Labor, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above case on June 30, 1954.

OPINIONS BELOW

The opinion of the district court (App. 3a) is reported at 113 F. Supp. 235. The *per curiam* opinion of the Court of Appeals (App. 1a) is reported at 214 F. 2d 132.

JURISDICTION

The judgment of the Court of Appeals (App. 2a) was entered on June 30, 1954. On September 23, 1954, the time for petitioning for a writ of certiorari was extended by order of Mr. Justice Black to October 5, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Respondent's employees have been engaged in construction work on the Algiers Lock and Canal, a project authorized by Congress under its power to regulate commerce. The project is designed as an improvement to, and an integral part of, the Gulf Intracoastal Waterway, an existing interstate waterway. It has been undertaken in the "interests of eliminating hazards and delays to existing and prospective commerce and for assuring the dependability of the waterway."

The question presented is whether these employees are "engaged in commerce" within the meaning of the Fair Labor Standards Act, or whether work on such projects is excluded from the "commerce" coverage of this Act by reason of the "new construction" doctrine derived from early decisions under the Federal Employers' Liability Act.

STATUTE INVOLVED

This case arises under the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended by the Fair Labor Standards Amendments of 1949, c. 736, 63 Stat. 910, 29 U. S. C. 201 *et seq.*, the pertinent provisions of which are:

Definitions:

SEC. 3 [63 Stat. 911]. As used in this Act—

* * * * *

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

* * * * *

Maximum Hours:

SEC. 7 [63 Stat. 912]. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

Investigations, Inspections, Records * * *

SEC. 11 [52 Stat. 1066]. * * * (c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Adminis-

trator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

STATEMENT

The Secretary of Labor brought this action pursuant to Section 17 of the Fair Labor Standards Act to enjoin respondent from violating the overtime and record-keeping requirements of that Act. The employees in question were employed in the performance of a half-a-million dollar contract awarded to respondent by the United States Corps of Engineers in connection with the construction of the Algiers Lock and Canal project in Orleans Parish, Louisiana.

The Algiers Lock and Canal is to form an integral part of an existing project known as the Gulf Intracoastal Waterway. It is designed to improve and make a faster, safer, and more dependable passage into, out of, and across the Mississippi River at New Orleans than is provided by the present Harvey Lock and Canal alone (district court opinion, App. 4a-5a). It was recommended by the Corps of Engineers (Sen. Doc. No. 188, 78th Cong., 2d. Sess.), and authorized by Congress under its power to regulate commerce (Rivers and Harbors Act of 1945, c. 19, 59 Stat. 10, 18) in the "interests of eliminating hazards and delays to existing and prospective commerce and for assuring the dependability of the waterway" (Sen. Doc. *supra*, p. 5).

The Gulf Intercoastal Waterway extends from Apalachee, Florida, to the Mexican border and is an instrumentality of commerce (district court opinion, App. 4a). Along the Gulf of Mexico the waterway crosses the Mississippi River at New Orleans. The main route of the waterway at this point now enters the Mississippi from the east through the Industrial Canal, extends upstream 5.5 miles through the harbor of New Orleans, and then leaves the river from the west through the Harvey Lock and Canal (Sen. Doc. *supra*, p. 3).

New Orleans is a major port for seagoing commerce and the main transshipment terminal for intracoastal barge traffic (Sen. Doc., *supra*, p. 3). In the 5.5 mile stretch of the waterway through this port intracoastal traffic has to compete with seagoing commerce for room to navigate (district court opinion, App. 4a). Moreover, intracoastal traffic itself "has greatly exceeded original expectations" (Sen. Doc. *supra*, p. 3) and Harvey Lock and Canal, built in 1934 (R. 41), is, as the district court found, "proving inadequate alone to handle" it (App. 4a). Since it is not practical to widen the Harvey Lock and Canal because it is located in a highly developed industrial section of the City of New Orleans (Sen. Doc. *supra*, p. 12, R. 40), Algiers Lock and Canal is being constructed to provide an alternate connection with the Mississippi at a point 4.7 miles downstream from the Industrial Canal (Sen. Doc., *supra*, p. 4).

The Algiers Lock and Canal will not only elimi-

nate the delays now encountered by intracoastal traffic using the congested Harvey Lock, but it will provide safer passage across the Mississippi. As the district court recognized, Algiers Point is "very dangerous and hazardous * * * and * * * has been the scene of many, many serious marine casualties" (R. 44). The Algiers Lock and Canal will avoid treacherous Algiers Point and the crowded port of New Orleans (district court opinion, App. 5a). Also, this alternate connection with the Mississippi will assure the dependability of the Intracoastal Waterway. As pointed out in the Senate Document covering this project, there is no closed navigation season on the lower Mississippi and the intracoastal waterway during which general overhaul and major repairs to locks may be accomplished without stopping traffic (Sen. Doc., *supra*, pp. 11-12, 13). Any accident or mishap necessitating the closure of Harvey Lock would interrupt the heavy volume of waterborne commerce using it since only a minor portion of this traffic could be diverted through the smaller alternate west bank connection at Plaquemine, 110 miles upstream from Harvey Lock (*id.* pp. 3, 11-12).

As described in the pertinent Senate Document, the Algiers Lock and Canal project involves the construction of a channel 12 feet deep and 125 feet wide, extending from the right bank of the Mississippi River, at a point 4.7 miles below the Industrial Canal, southwesterly a distance of 9 miles to the Intracoastal Waterway about six miles south

of Harvey Lock; a lock at the river end, 75 feet wide, 760 feet long and 13 feet deep, with an emergency storage dam; widened forebays at the lock; drainage canals east of the waterway to intercept existing drainage facilities; two pumping plants, two movable highway bridges and a movable railroad bridge across the waterway; a road relocation requiring two fixed bridges over existing canals, and other minor adjustments in local improvements.

Respondent's contract was for the "Earthwork and Emergency Dam Storage," described by its president as "build[ing] guide levees on the Mississippi River on the east end, and backfill[ing] the lock" (R. 51; district court opinion, App. 3a). At the time this work was undertaken by respondent, only the concrete work on the locks had been completed (R. 51). The project was still incomplete at the time of trial. Among other things, the earthwork levee which respondent built from the lock structure to the Mississippi levees in Algiers had not been tied in with those levees (R. 49). The canal itself had not been completely dredged (*id.*). Guide levees to the canal still had to be completed and the Mississippi River levees brought up to grade (R. 48-49). Of course, until the project is completed, it cannot be used as a part of the Gulf Intracoastal Waterway (R. 49). But work is continuing on it, and the Corps of Engineers contemplates that the project will be completed at the end of December, 1954 (R. 50).

Although the trial court found that the primary purpose of Algiers Lock and Canal is to relieve "the congestion which now obtains in Harvey Lock and Canal [and, in addition] * * * eliminate the necessity of Gulf Intracoastal Waterway traffic navigating the 5.5 miles of the Mississippi River through the crowded harbor of New Orleans and around treacherous Algiers Point" (App. 5a), it held that the work falls within the "new construction" doctrine of the early decisions under the Federal Employers' Liability Act, rather than the principles of *Overstreet* v. *North Shore Corp.*, 318 U.S. 125, and *Pedersen* v. *J. F. Fitzgerald Const. Co.*, 318 U.S. 740, 324 U.S. 720, and that respondent's employees could not, therefore, be said to be "engaged in commerce" within the meaning of the Fair Labor Standards Act. The Court of Appeals affirmed in a short *per curiam* opinion (App. 1a), which simply expressed agreement with the district judge's opinion, and cited two of its own recent decisions: *Van Klaveren* v. *Killian-House Co.*, 210 F. 2d 510 (involving work on a highway construction project) and *Billeaudeau* v. *Temple Associates, Inc.*, 213 F. 2d 707 (involving work in connection with construction of a housing project).

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed not only because it conflicts with decisions of several other courts of appeals and departs from principles enunciated by this Court, but also because of

its far-reaching importance in the interpretation and enforcement of the Fair Labor Standards Act. The decision, in its application of the "new construction" doctrine to an interstate waterway project, reflects the more general problems and confusion resulting from the application of that doctrine by a number of other lower federal courts in interstate highway construction cases. The question presented is thus not only of importance to the thousands of employees engaged in similar waterway projects throughout the country, but also to the thousands of employees engaged in interstate highway construction projects.

1. The decision below is in direct conflict with the Tenth Circuit's decision in *Tobin* v. *Pennington-Winter Construction Co.*, 198 F. 2d 334, certiorari denied, 345 U.S. 915; and is also, we believe, inconsistent with the Sixth Circuit's decision in *Walling* v. *Patton-Tulley Transp. Co.*, 134 F. 2d 945, and with the Ninth Circuit's decision in *Ritch* v. *Puget Sound Bridge & Dredging Co.*, 156 F. 2d 334. In all of these cases, employees working on interstate waterway improvement projects were held to be "engaged in commerce" within the coverage of this Act, despite claims that the work was "new construction."

The *Pennington-Winter* decision, we believe, is indistinguishable from the instant case; indeed, the factual situation in the instant case affords an even stronger basis for coverage. The work held covered in *Pennington-Winter* was that of clearing the

reservoir site for a proposed new dam designed as part of a comprehensive plan for the improvement of the Arkansas and Mississippi Rivers. There, as here, the project had been authorized by Congress under its power to regulate commerce. As in the instant case, the work was not physically in the river bed or waterway to be improved, and the improvement to navigation would not be accomplished until the proposed project was completed. The dam and reservoir project in the *Pennington-Winter* case was less closely related to commerce, both in physical location and in practical effect upon the existing navigable channel, than is the lock and canal project involved in the instant case. The *Pennington-Winter* dam was to be located on a non-navigable tributary of the Arkansas River some 13 miles upstream from the confluence of the rivers whose navigability was to be improved by the dam, and its beneficial effect upon navigability depended largely upon the construction of a number of other similar tributary projects proposed in a comprehensive plan to be carried out over a period of years. In this respect, the instant case seems to present a stronger basis for coverage, since here the lock and canal is to be physically connected, at both ends, with the existing Gulf Intracoastal Waterway and is to be an integrated link in the navigable waterway itself. Moreover, in *Pennington-Winter* the dam was designed to serve various purposes (electric power, flood control, recreation) in addition to improving the navigability

of the affected waters. Here, the sole function of the project is improvement of the artery of commerce.

The trial court in *Pennington-Winter*, like the trial court here, had held that "New construction of an instrumentality of interstate commerce is not covered by the Fair Labor Standards Act" (see 10 WH Cases 506; 20 Labor Cases Par. 66705 (E.D. Okla., 1951) (not otherwise reported). But the Tenth Circuit, pointing to the fact that the multiple-purpose dam there in issue was part of a comprehensive plan for the improvement of existing waterways, reversed on the ground that the construction, though "new," was "no more than an improvement of an existing project for the control of floods and the betterment of navigation" (198 F. 2d at 336). "The construction of a new levee or a new dam is not to be considered as a separate construction," said the court (*id.* at 337). "They are no more than an addition to, or an improvement of, an existing instrumentality of interstate commerce" (*ibid.*).

The main reason given by the trial court in the instant case for not following *Pennington-Winter* and the decisions discussed *infra* (pp. 13-14) is that the project here involves "new construction" and is not physically located "in the [interstate] instrumentality itself" (App. 6a-7a, 10a). But, even assuming these factors to be significant, plainly the dam in *Pennington-Winter* was no less "new construction" than the work here, and, contrary to

the apparent assumption of the trial court below, the work there was that of clearing land for a reservoir, and was not physically in the existing interstate instrumentality it was designed to improve. The fact which the Tenth Circuit deemed significant and controlling in *Pennington-Winter* was that the project was "no more than an addition to, or an improvement of, an existing instrumentality of interstate commerce" (198 F. 2d at 337), regardless of whether it was new and regardless of whether it was physically located in the existing navigable channel.

The trial court in the instant case also relied (see App. 6a, 8a-9a) upon a ruling of the Wage and Hour Division and upon the decision of the Fifth Circuit in *Reed* v. *Murphey*, 168 F. 2d 257, which hold that employees engaged in the construction of a new building or structure to be dedicated, when completed, to the production of goods for commerce are not, during the period of construction, so closely related to commerce as to bring them within the coverage of the Act. But, as the Tenth Circuit said in *Pennington-Winter*, where it considered the *Reed* decision and others like it: "* * * this is not new construction in the sense that a new building for the manufacture of goods for commerce is new construction. Such a building by its mere construction is no part of commerce and has without more no active connection or relation thereto. It does not follow from the mere construction of such a building that it ever will have connection with

commerce or be dedicated to the production of goods for commerce. It could, after its construction, be dedicated solely for intrastate commerce, if its owners deem such use advisable." 198 F. 2d at 336.[1]

The decision below also conflicts in principle with the Sixth Circuit's decision in *Walling* v. *Patton-Tulley Transp. Co.*, 134 F. 2d 945, and with the Ninth Circuit's ruling in *Ritch* v. *Puget Sound Bridge & Dredging Co.*, 156 F. 2d 334, although the factual situations in those cases are not so strikingly similar as in the *Pennington-Winter* case. In the *Patton-Tulley* case, the Sixth Circuit held the Act applicable to employees engaged in the construction of new dikes and revetments on the Mississippi River. There, as here, the purpose of the work was to improve a navigable waterway. Also there, as here, the trial court had denied coverage on the basis of the "new construction" doctrine of the early Federal Employers' Liability Act cases. The Sixth Circuit, in reversing, re-

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[1] The court of appeals here, apart from its reliance upon the trial court's opinion, cited two decisions of its own, *Billeaudeau* v. *Temple Associates, Inc.*, 213 F. 2d 707, and *Van Klaveren* v. *Killian-House Co.*, 210 F. 2d 510. In *Billeaudeau*, however, the construction work was in connection with a local housing project, which was plainly not an instrumentality of commerce. The *Van Klaveren* decision held the Act inapplicable to a watchman employed in connection with the construction of a new highway project. We agree that the problems presented by highway construction projects are frequently analagous to those involved in waterway projects (see discussion *infra*, pp. 16-19, 22), though in the former class of cases the issues are not always so clearcut.

jected the "new construction" argument, stating that "the short answer is that the Mississippi River has been a highway of interstate commerce since states were first carved out of its contributory territory" (134 F. 2d at 947). In the *Puget Sound* case, the Act was held applicable to employees engaged in dredging new channels and constructing a new pier with retaining walls at Bremerton Harbor on the ground that the work extended the previously navigable portion of the harbor.

2. The decision below, in approach and in result, seems plainly inconsistent with the basic principles established by this Court's decisions construing the coverage of the Fair Labor Standards Act. Since the issue involved has far-reaching implications not only in the large area of employment on waterway construction projects but also in the equally important area of highway construction, review by this Court is of particular importance.

Instead of looking at the context of the "in commerce" language in this Act and the principles which this Court has held should guide its construction, the decision below simply assumed that the test of coverage was the "new construction" doctrine derived from several early decisions under the original Federal Employers' Liability Act. This Court has repeatedly admonished against applying any mechanical test or "touchstone" in determining the coverage of the Fair Labor Standards Act, as well as against "too narrow a construction of the Act." See *Kirschbaum* v. *Walling*, 316 U. S. 517, 520-521; *Walling* v. *Jacksonville Paper*

Co., 317 U.S. 564, 567; *Powell* v. *U. S. Cartridge Co.*, 339 U.S. 497, 516-517. The decisions have specifically pointed out that "The use of the words 'in commerce' entails an analysis" of the particular transactions and operations involved (*Jacksonville Paper*, at 571), and have emphasized the need to be guided by "practical considerations," such as the actual integral relationship of the employees' work to the interstate commerce, and the "national" as distinguished from "purely local" character of the work. *Kirschbaum* v. *Walling*, *supra*; *Overstreet* v. *North Shore Corp.*, 318 U.S. 125, 128. While noting that Congress did not exert its full constitutional power in this Act, this Court at the same time has reiterated that "it is clear that the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce" (*Walling* v. *Jacksonville Paper Co.*, *id.* at 567; *Overstreet* v. *North Shore Corp.*, *id.* at 128), and that "the policy of Congressional abnegation with respect to occupations affecting commerce is no reason for narrowly circumscribing the phrase 'engaged in commerce'" (*Overstreet* at 128).

We submit that the narrow "new construction" doctrine, derived from decisions rendered over 37 years ago under the old Federal Employers' Liability Act, is not the touchstone for determining the "in commerce" coverage of the Fair Labor Standards Act. This artificial test certainly does not afford an adequate means of determining whether construction work on interstate instru-

mentalities of commerce is "so intimately related to interstate commerce 'as to be in practice and in legal contemplation a part of it'" (*Overstreet* decision at 130). When rigidly applied, it has inevitably led to incongruous results inconsonant with the broad purpose and design of the Act and with the "national" concept of commerce which it embraces. As a practical matter, it seems evident that "new construction" improving or expanding an instrumentality of interstate commerce is apt to have more substantial impact upon that commerce and no less intimate relation to it than ordinary repair and maintenance activities. Various courts of appeals have recognized this in dealing with interstate waterway improvement projects (see decisions cited, *supra*, pp. 9-14), although a different view has been taken by some of the same courts in cases involving interstate highway construction.[2] The decision below would extend the dubious reasoning of the latter cases to another large area of employment.

The direct and substantial relationship of waterway and highway improvement projects to inter-

[2] Several courts of appeals have ruled in recent years that the act is inapplicable to "new construction" of roads to be later connected with the interstate highway system. *Van Klaveren* v. *Killian-House Co.*, 210 F. 2d 510 (C.A. 5); *Moss* v. *Gilliez Const. Co.*, 206 F. 2d 819 (C.A. 10); *Koepfle* v. *Garavaglia*, 200 F. 2d 191 (C.A. 6). Compare, however, *Walling* v. *McCready Construction Co.*, 156 F. 2d 932 (C.A. 3), certiorari denied, 329 U.S. 785. The three first-mentioned cases involved suits instituted by employees, and the Department of Labor appeared only as *amicus curiae*. The Government was not in a position to seek Supreme Court review, and the unsuccessful employees did not do so.

state commerce seems indisputable. Plainly there is nothing peculiarly "local" about such projects; they are not "historic functions of the individual states" which practical considerations would place beyond the broad scope of commerce contemplated by the Act. See *Kirschbaum* decision at 520-521, 523. Indeed, so far as the development of navigable waters is concerned, the matter is exclusively within the federal domain; Congress's "power over improvements for navigation in rivers is 'absolute' ", *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 405. And see *Gibbons* v. *Ogden*, 9 Wheat. 1, 23; *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508.[3] This Court has also declared that "roads" (as well as railroads) "are in law and in fact integrated and indispensable parts of our system of commerce among the states." *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13, 16. The peculiarly national character of both road and waterway construction is also significantly evidenced by the fact that they have long been financed wholly or in large part by federal funds.

Labeling a waterway or highway improvement project "new" casts little if any light on the standards which this Court's decisions have prescribed for determining whether work is within the "in commerce" coverage of the Act. And nothing in this Court's decisions implies that construction

[3] In the *Oklahoma* case, this Court, considering Congress's powers under the commerce clause, rejected the idea of "viewing each reservoir project in isolation from a comprehensive plan" covering the entire river system. 313 U.S. at 525.

work, whose unquestioned use and purpose is to improve or assure the efficient and proper functioning of an interstate channel, is excluded from the Act merely because it is "new." While the work in the *Overstreet* case, *supra*, was maintenance and repair work, the *ratio decidendi* was that the work was "vital to the proper functioning of * * * instrumentalities of interstate commerce" and that it provided "a means of interstate transportation and communication * * * so intimately related to interstate commerce 'as to be in practice and in legal contemplation a part of it.' " 318 U.S. at 128, 130. That the principle does not exclude "new" construction is evidenced by the fact that the construction work held covered in the closely related case of *Pedersen* v. *J. F. Fitzgerald Construction Co.*, 318 U.S. 740, 742; 324 U.S. 720, involved "entirely new" bridge abutments which had not been completed during the period of employment involved (324 U.S. at 724).[4]

Although the "new construction" doctrine was not explicitly considered in the recent cases of *Allstate Construction Co.* v. *Durkin*, 345 U.S. 13, and *Thomas* v. *Hempt Bros.*, 345 U.S. 19, the holding there—that employees engaged in the manufacture of road materials were producing goods for commerce—apparently drew no distinction between an end use in road maintenance work and

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[4] In *Pedersen*, the "new construction" argument was vigorously pressed by the employer. See brief in opposition in No. 396, Oct. Term 1942, pp. 5, 10.

utilization in "new construction." Thus, the opinion in the *Hempt* case noted that the complaint alleged that the materials were being produced for "laying and building" the Pennsylvania Turnpike and "to build and erect landing fields" at an airport, as well as for repair and maintenance of road beds. 345 U.S. at 20. It was the close relationship to interstate instrumentalities of commerce which was, without more, controlling.[5]

In applying the Federal Employers' Liability Act cases to the coverage question, the decision below seems to have ignored this Court's recognition in the *Overstreet* decision that the two Acts, though similar in some respects, "are not strictly analogous" (318 U.S. at 131), and its caution (in *McLeod* v. *Threlkeld*, 319 U.S. 491, 495) that "There is no single concept of interstate commerce which can be applied to every federal statute regulating commerce" and that "The effect of the over-refinement

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[5] See the decision of the Third Circuit in *Walling* v. *McCrady Construction Co.*, 156 F. 2d 932, certiorari denied, 329 U.S. 785, and of the Fourth Circuit in *Bennett* v. *V. P. Loftis Co.*, 167 F. 2d 286. In the latter case, the Fourth Circuit, after meticulously analyzing this Court's decisions in the *Overstreet, Pedersen, and Jacksonville Paper* cases, *supra*, as well as the decisions under the Federal Employers' Liability Act, rejected the contention that the construction of a new highway bridge was outside the scope of the Act under the "new construction" doctrine, stating (167 F. 2d at 288): "If the declared purpose of the Act is to be accomplished, a project should be considered as a whole, in a realistic way; not broken down into its various phases so as to defeat the purpose of the Act. This latter unrealistic approach was condemned by the Supreme Court in *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564 • • •."

of factual situations which hampered the application of the Federal Employers' Liability Act, prior to the recent amendment, we hope is not to be repeated in the administration and operation of the Fair Labor Standards Act." See also *Walling* v. *McCrady Construction Co.*, 156 F. 2d 932, 936 (C.A. 3), certiorari denied, 329 U.S. 785.

The earlier statute was, of course, restricted to the interstate transportation operations of railroads. Indeed, it was then the prevailing view that the power of Congress to regulate the incidents of employment was confined to employees engaged in "transportation" (see *Employers' Liability Cases*, 207 U.S. 463; *Raymond* v. *Chicago, M. & St. P. Ry.*, 243 U.S. 43; *New York, N. H. & H. R. Co.* v. *Bezue*, 284 U.S. 415)—a view which produced many of the over-refinements (including the "new construction" doctrine) which characterized the early interpretations of the Act. For example, the statute was narrowly construed as not applying to back-shop employees engaged in making repairs on locomotives and cars. *Bezue* case, *supra*. Only later, and then under another statute (the Railway Labor Act), were these back-shop activities held to "have such a relation to the other confessedly interstate activities * * * that they are to be regarded as a part of them," *Virginian Railway* v. *System Federation*, 300 U.S. 515, 556.[6]

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[6] We do not, of course, refer to the *Virginian Railway* case to suggest that the standards of coverage under the Railway Labor Act and the Fair Labor Standards Act are identical, but in order to indicate the evolution of the "commerce" concept in the years following the early Employers' Liability cases.

The Fair Labor Standards Act was adopted after a more modern concept of "commerce" had emerged. Thus, in considering the scope of the "commerce" power, the legislators specifically referred to the holding in the *Virginian Railway* case, which had recently been decided by this Court.[7]

And in marked contrast to the Employers' Liability Act, which was limited to railroads, the Fair Labor Standards Act was designed for broad national purposes reaching into all industries engaged in interstate commerce. Its objective was not simply "to regulate interstate commerce as such," but "to eliminate, as rapidly as practicable, substandard labor conditions throughout the nation," *Powell* v. *U. S. Cartridge Co.*, 339 U.S. at 510. Its "scope was stated in terms of substantial universality" because "Breadth of coverage was vital to its mission," *id.* at 516.

Not surprisingly, the effort to import into the latter Act the doctrines of early Employers' Liability cases has produced anomalous results. The consequence has been to exclude from the Act's coverage work of the most "national" character and work most significantly and directely related to interstate navigation, such as the lock and canal project in the instant case, while including work on levees, dikes, revetments, reservoirs and dams.

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[7] Senator (now Mr. Justice) Minton, in the course of a colloquy with Senators Borah and Bailey on the intended scope of the Act's coverage, explicitly pointed out that the Supreme Court had held back-shop employees "to be in commerce." 83 Cong. Rec. 9172.

whose effects on navigation are less directly significant to the interstate traffic on the waterway. The same incongruities have occurred in the road construction cases. Thus, work on such nationally important projects as the Edsel Ford Expressway in Detroit and the San Antonio Expressway in Texas (*Koepfle* v. *Garavaglia*, 200 F. 2d 191 (C. A. 6); *Martinez* v. *Killian-House Co.*, 255 S. W. 2d 227 (Texas Civ. App.), followed in *Van Klaveren* v. *Killian-House Co.*, 210 F. 2d 510 (C.A. 5)), have been held to be less intimately related to interstate commerce than repair and maintenance work on ordinary city feeder streets whose connection with the interstate highway system is not nearly as direct or vital to interstate commerce as are the important expressways from large industrial centers.[8] The persistent conflict and confusion in the cases can only be corrected by review in this Court.

3. The general importance of the issue involved in the instant case is further evidenced by the hundreds of other navigation projects currently authorized and by the huge sums appropriated by Congress in 1953 and 1954 for navigation and flood con-

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[8] We recognize, of course, that in some instances road construction which bears an appreciable relationship to interstate traffic may also serve local traffic in equal or greater degree, and that there may be cases in which the substantiality of the interstate aspects presents a question of fact. Certainly, however, no such problem is involved in the instant waterway case since the only purpose served is that of a national artery of commerce.

trol.[9] Senate Report No. 2007, 83d Cong., 2d Sess., p. 3, states:

> * * * the total number of navigation projects or modifications now under way but not completed is 143 and the total cost is $1,409 million, of which $878 million has been appropriated through the fiscal year 1954. Navigation projects or modifications authorized but not yet started total 254 in number and have a total estimated cost of $911 million of which $5 million has been appropriated to date for planning purposes. The total active navigation program, therefore, amounts to 2,166 projects or modifications, having a total estimated cost of $3,176 million, of which $1,739 million is the cost to date. The foregoing figures exclude a few multiple-purpose projects which include other major functions in addition to navigation. Technically authorized but considered inactive or deferred for restudy are a number of navigation projects not included in the foregoing figure.
>
> These projects lie in all parts of the United States and its possessions and include 28,000 miles of improved waterways, about 500 locks

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[9] See Public Law 504, 82nd Cong., 2d Sess., 66 Stat. 579, Public Law 153, 83rd Cong., 1st Sess., 67 Stat. 197, and Public Law 453, 83rd Cong., 2d Sess., 68 Stat. 330, appropriating funds for river and harbor and flood control projects for the fiscal years ending June 30, 1953, June 30, 1954, and June 30, 1955, respectively.

and dams, and almost 300 commercial harbors.
* * *

For a list of these various projects, see Statement of the Managers on the Part of the House (Report No. 2497, 82d Congress, 2d Sess.).

The extent of road construction work is indicated by the hundreds of millions of dollars contributed to the States each year by the Federal Government for this purpose. Thus, during the 83rd Congress over a billion dollars was appropriated [10] to carry out authorized highway construction programs. Moreover, an addition road construction program was authorized by Public Law 350, 83rd Cong., 2d Sess., on the basis of $700 million for each of the fiscal years 1956 and 1957. Since contributions to the States are made on the basis that the States expend an amount equal to that contribution, the total expenditure is expected to be double these amounts.

It is thus apparent that the effect on the numerous workers employed on waterway projects alone is of sufficient importance to warrant review of the decision below. Insofar as additional thousands of employees engaged in comparable road construction may be also affected, the importance of this review is, of course, correspondingly increased.

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[10] Public Law 11, 83rd Cong., 1st Sess., 66 Stat. 464 ($198 m.); Public Law 59, 83rd Cong., 1st Sess., 67 Stat. 57 ($5 m.); Public Law 195, 83rd Cong., 1st Sess., 67 Stat. 367 ($499,250,000); Public Law 357, 83rd Cong., 2d Sess., 68 Stat. 81 ($55 m.); Public Law 471, 83rd Cong., 2d Sess., 68 Stat. 413 ($517 m.); Public Law 663, 83rd Cong., 2d Sess., 68 Stat. 800 ($18,250,000).

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.

STUART ROTHMAN,
Solicitor,
United States Department of Labor.

OCTOBER 1954.

APPENDIX

OPINION OF THE COURT—Filed June 30, 1954

In the

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 14749

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT,

versus

C. W. VOLLMER & COMPANY, INC., APPELLEE.

Appeal from the United States District Court for the Eastern District of Louisiana.

(June 30, 1954.)

Before STRUM and RIVES, Circuit Judges, and DAWKINS, District Judge.

PER CURIAM: We find ourselves in agreement with the views expressed by the learned district judge and approve his opinion reported in 113 F. Supp. 235, et seq. See also the later opinion of this Court in *Van Klaveren* v. *Killian-House Co.*, 210 F. 2d. 510, and *Billeaudeau, et al.* v. *Temple Associates, Inc.*, No. 14,931, Ms., decided June 18, 1954. The judgment is therefore

AFFIRMED.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JUDGEMENT

Extract from the Minutes of June 30, 1954

No. 14749

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

versus

C. W. VOLLMER & COMPANY, INC.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

Civil Action No. 3280

MARTIN P. DURKIN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

versus

C. W. VOLLMER & COMPANY, INC., DEFENDANT

June 25, 1953

WRIGHT, District Judge:

Plaintiff brings this action seeking to enjoin the defendant from violating the provisions of sections 7 and 11(c) of the Fair Labor Standards Act [1] relating to the nonpayment to employees of overtime and failure to keep proper employee work records. The question presented is whether the defendant's employees are "engaged in commerce" within the meaning of section 7(a) of the Act.

The defendant entered into a contract with the United States through the Corps of Engineers, Department of the Army, under the terms of which defendant agreed to construct an earth-work embankment and concrete platform for Algiers Lock, Orleans Parish, Louisiana. Algiers Lock is par. of the proposed Algiers Lock and Canal. Algiers Lock

[1] 29 U.S.C.A. § 201 et seq.

and Canal will be a part of the Gulf Intracoastal Waterway and will serve as an alternate lock and canal connection with the Mississippi River in the vicinity of the Port of New Orleans. The present connection in that vicinity, Harvey Lock and Canal, is proving inadequate alone to handle the volume of traffic in the Gulf Intracoastal Waterway.

The Gulf Intracoastal Waterway from Apalachee Bay, Florida, to the vicinity of the Mexican Border is an instrumentality of interstate commerce and is regularly navigated by vessels and barges in transporting goods in interstate commerce. At the present time eastbound navigation on the Gulf Intracoastal Waterway enters the Mississippi River from the Harvey Lock and Canal and then proceeds down river 5.5 miles to the Industrial Lock and Canal where it leaves the river. Westbound navigation, of course, reverses this procedure. The stretch of 5.5 miles in the Mississippi River is through the harbor of New Orleans where intracoastal traffic must compete with ocean-going traffic for room to navigate. In addition, the banks of the river on both sides are highly developed with commercial facilities including dock and wharves serving the Port of New Orleans. Further, there is along this stretch Algiers Point, which marks an acute bend in the river. The navigation of this point by both ascending and descending traffic is particularly difficult because of the swift current moving down river.

The current federal project for intracoastal

waterways, as outlined in Senate Document 188,[2] includes, in addition to the construction of Algiers Lock and Canal, the improvement, enlargement and extension of the Gulf Intracoastal Waterway by increasing its present depth and width and extending it west and south to the Mexican Border. This project also covers the cutting of a canal through northern Florida thereby connecting the Gulf Intracoastal Waterway with the Atlantic Intracoastal Waterway. The completion of the project depends on the continued appropriation of federal funds.

Algiers Lock and Canal, which has not been completed, is entirely new construction. The proposed nine mile canal does not follow any pre-existing right of way and, when completed, will not replace any existing canal or other navigable waterway. As has been stated, it will simply be an alternate route for entering the Mississippi River from the west and leaving it from the east. Its primary purpose, in addition to relieving the congestion which now obtains in Harvey Lock and Canal, will be to eliminate the necessity of Gulf Intracoastal Waterway traffic navigating the 5.5 miles of the Mississippi River through the crowded harbor of New Orleans and around treacherous Algiers Point.

The government alleges that Algiers Lock and Canal is merely an improvement of the existing waterway being constructed pursuant to the overall project for the improvement and enlargement of the intracoastal waterways of the United States

[2] 78th Congress, 2nd Session.

as outlined in Senate Document 188. As such, the government contends, the employees working on the construction of the Algiers Lock are "engaged in commerce" or so closely connected thereto they are covered by the Fair Labor Standards Act. The defendant on the other hand maintains that the building of Algiers Lock is new construction and therefore employees concerned with the building of the lock are not covered.

The question presented here for adjudication is an extremely narrow one. It is clear that persons engaged in the maintenance and repair of interstate instrumentalities are within the coverage of the act. *Overstreet* v. *North Shore Corp.*, 318 U. S. 125; *Pedersen* v. *J. F. Fitzgerald Construction Co.*, 318 U. S. 740; *Alstate Construction Company* v. *Durkin*, 345 U. S. 13; *Thomas* v. *Hempt Bros.*, 345 U. S. 19. It is likewise clear that persons engaged in the construction of new interstate instrumentalities are not covered by the act. *Raymond* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 243 U. S. 43; *J. F. Fitzgerald Company* v. *Pedersen*, 324 U. S. 720; *Nieves* v. *Standard Dredging Corporation*, 152 F. 2d 719 (CA 1); *Laudadio* v. *White Construction Company*, 163 F. 2d 383 (CA 2); *Reed* v. *Murphey*, 168 F. 2d 257 (CA 5); *Scholl* v. *McWilliams Dredging Company*, 169 F. 2d 729 (CA 2); *Koepfle* v. *Garavaglia*, 200 F. 2d 191 (CA 6). Consequently, does the building of Algiers Lock and Canal amount to maintenance and repair of the Gulf Intracoastal Waterway or is it new construction as defined in the cases cited?

Although the government argues that the Algiers Lock and Canal is merely an improvement of the existing waterway, no cases are submitted which hold that improvement of an interstate instrumentality through the construction of a new or alternate route is covered by the act. All of the government cases relate to the improvement of an existing instrumentality by the construction of revetments and the like in the instrumentality itself. *Walling* v. *Patton-Tulley Transportation Co.*, 134 F. 2d 945 (CA 6); *Bennett* v. *V. P. Loftis Co.*, 167 F. 2d 286 (CA 4); *Schmitt* v. *War Emergency Pipelines*, 175 F. 2d 335 (CA 8); *Tobin* v. *Pennington-Winter Const. Co.*, 198 F. 2d 334 (CA 10); *Ritch* v. *Puget Sound Bridge & Dredging Co.*, 156 F. 2d 334 (CA 9); *Walling* v. *McCrady Const. Co.*, 156 F. 2d 932 (CA 3).

It is true that the Supreme Court has held that the provisions of the Fair Labor Standards Act should be liberally construed in order to carry out the basic social purpose of the act. *Tennessee Coal Company* v. *Muscoda Local No. 123*, 321 U. S. 590. However, in 1949 Congress, apparently motivated by a feeling that the courts had gone too far in extending coverage, amended the act limiting the coverage to some extent. Amendment of Oct. 26, 1949, Chapter 736, Section 3, 63 Stat. 911, 29 U. S. C. A. § 203(j). Statement of House Conferees, Report No. 1453, 81st Congress pp. 14-15. While the amendment does not bear on the point at issue here, nevertheless, it does show that Congress in passing the Fair Labor Standards Act did not in-

tend that coverage under the act would be co-extensive with the power of Congress to control interstate commerce. This fact has been recognized by the courts. *Kirschbaum Co.* v. *Walling*, 316 U. S. 517; 523; *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564. Under the test for coverage as judicially determined the work in question must either be "in commerce" or so closely connected thereto as to be a part thereof. *Pedersen* v. *Delaware L. & W. RR.*, 229 U. S. 146; *Overstreet* v. *North Shore Corp.*, *supra*.

In applying this rule, the Wage and Hour Division itself draws a distinction between original construction and repair or reconstruction.[3] The rec-

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[3] In the Wage Hour Manual, Bureau of National Affairs Labor Relations Reporter, Volume 6, the rule is interpreted as follows:

10:237:

"In interpreting the Act's application to the employers in the building and construction industry, the Wage and Hour Division and the courts have drawn a distinction between the original construction of buildings or facilities and the repair or reconstruction."

10:238:

"The distinction between original construction and repair or reconstruction has also been recognized by the numerous lower federal and state courts which have decided cases involving the Act's covering of building and construction operations."

Wage and Hour Division Bulletin No. 5 of October, 1940, page 7, paragraph 12 reads as follows: "The employees of local construction contractors generally are not engaged in interstate commerce and do not produce any goods which are shipped or sold across state lines. Thus it is our opinion that employees engaged in original construction of buildings are not generally within the scope of the Act, even if the building when completed will be used "to produce goods for commerce."

ognition by the Division that new construction is not covered by the act, while not controlling, is highly persuasive. *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, n. 129; *Koepfle* v. *Caravaglia*, 200 F. 2d 191, 193 (CA 6). Unless the fact that the Algiers Lock and Canal will become a part of an existing waterway after it is completed makes the building thereof "repair or reconstruction," under the Division's own interpretation, defendant's employees are not covered by the act.

Since there is no authoritative holding respecting coverage under the Fair Labor Standards Act of work performed in the construction of an alternate route for an existing interstate instrumentality, guidance may be sought from decisions interpreting coverage under the Federal Employers Liability Act.[4] *Overstreet* v. *North Shore Corp.*, supra. So doing, there is the case of *Raymond* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, supra, in which the railroad, an interstate carrier,was engaged in construction of a tunnel for the purpose of "shortening its main line and making more efficient and expeditious its freight and passenger service." One of its employees was injured in the construction of the tunnel and filed suit under the Federal Employers Liability Act. At the time of the injury the tunnel was not complete and was not connected with the main line of the railroad. In denying recovery, the Supreme Court held "it is certain * * * that

[4] Before the 1939 amendment to Federal Employers Liability Act expanded coverage under that Act. 53 Stat. 1404; 45 U.S.C.A. § 51 *et seq.*; *Overstreet* v. *North Shore Corp.*, *supra*.

* * * Raymond and the railroad company were not engaged in interstate commerce at the time the injuries were suffered."

The new construction doctrine [5] of the Raymond case has been applied in cases brought under the Fair Labor Standards Act and it would seem that the principles there announced are applicable here. *J. F. Fitzgerald Company* v. *Pedersen,* supra; *Nieves* v. *Standard Dredging Corp.,* supra; *Laudadio* v. *White Const. Co.,* supra; *Reed* v. *Murphey, Scholl* v. *McWilliams Dredging Company,* supra; *Koepfle* v. *Garavaglia,* supra. If the government were simply building a canal which, when completed, would connect two interstate waterways, it would hardly be asserted that the work on such construction was within the coverage of the act. The mere fact that the Algiers Lock and Canal, when completed, will become a part of the integrated system of intracoastal waterways of the United States should not change this conclusion. Until the Algiers Lock and Canal is dedicated to and used for interstate commerce, it cannot be said that the work thereon is "in commerce" or so closely connected thereto as to be a part thereof. As a matter of fact, should Congress fail to appropriate the nec-

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[5] The new construction doctrine was first recognized in *Pedersen* v. *Delaware L. & W. R. Co.,* 229 U.S. 146, at page 152:

> "Of course, we are not here concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such."

essary funds, Algiers Lock and Canal will never be completed and consequently it would then never become an artery of commerce. See *Parham* v. *Austin*, 158 F. 2d 566 (CA 5).

Judgment accordingly.

(S.) J. SKELLY WRIGHT,
United States District Judge.

New Orleans, Louisiana, June 25th, 1953.

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No. 387

In the Supreme Court of the United States

OCTOBER TERM, 1954

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

C. W. VOLLMER & COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE SECRETARY OF LABOR

SIMON E. SOBELOFF,
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state commerce and no less intimate relation to it than such ordinary and incidental activities as might be performed by a maintenance man or a ticket taker employed on the Waterway. Cf. *Overstreet* case, *supra*.

The project, moreover, is peculiarly "national" in its character. The development of navigable waters is an historic function of the Federal Government and Congress's "power over improvements for navigation in rivers is 'absolute.'" *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 405. The project not only serves the needs of interstate commerce; that, indeed, is its exclusive purpose.

The situation is not comparable to the construction of a factory building which, upon completion, may never be dedicated to commerce or used in the production of goods for commerce. A project such as that in the instant case is distinctively related to commerce "from the beginning of construction [by reason of] locality and design." Justice Hughes, speaking for a unanimous court in *The Raithmoor*, 241 U. S. 166, 176–177, a libel in admiralty involving the status of a new structure which, when completed was to be used solely as a beacon on the edge of a navigable channel.[2]

[2] In *Murphey* v. *Reed*, 335 U. S. 865, a Fair Labor Standards case in which this Court ordered the dismissal of "those causes of action involving solely construction work," the construction was not for the purpose of improving an existing instrumentality of commerce. Part of the war effort, it had to do with the building of a Navy camp for training

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BRIEF FOR THE SECRETARY OF LABOR

OPINIONS BELOW

The opinion of the district court (R. 53–57) is reported at 113 F. Supp. 235. The *per curiam* opinion of the Court of Appeals (R. 64) is reported at 214 F. 2d 132.

JURISDICTION

The judgment of the Court of Appeals (R. 64–65) was entered on June 30, 1954. The petition for a writ of certiorari was filed on October 5, 1954, and was granted on November 22, 1954 (R. 65). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

The determination whether a particular activity is so substantially and intimately related to commerce as to be deemed a part of it is, of course, one to be made on the facts of each case and in terms of the practical realities. We do not suggest that in making this determination a court should ignore any of the physical facts which bear upon the relationship of the employment activity to commerce. On the contrary, it is to consider all of the factors which illuminate and define the character of that relationship. Our objection to the decision below is that the court was apparently of the view that the single fact that construction is new construction, rather than maintenance and repair, is dispositive of the question of coverage. There is, we submit, no such mechanical test. It is not enough to say whether the work is for

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"Seabees" and a Naval Advance Base Depot which, upon completion, was to be used for the storage, assembly, and reshipment of materials and equipment. See *Reed* v. *Murphey*, 168 F. 2d 257, 259–260 (C. A. 5). Cf. *Tobin* v. *Pennington-Winter Construction Co.*, 198 F. 2d 334 (C. A. 10), certiorari denied, 345 U. S. 915, in which the court of appeals, considering the *Reed* case and others like it, stated that the construction of a waterway improvement project "is not new construction in the sense that a new building for the manufacture of goods for commerce is new construction. Such a building by its mere construction is no part of commerce and has without more no active connection or relation thereto. It does not follow from the mere construction of such a building that it ever will have connection with commerce or be dedicated to the production of goods for commerce. It could, after its construction, be dedicated solely for intrastate commerce, if its owners deem such use advisable." 198 F. 2d at 336.

STATUTE INVOLVED

This case arises under the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended by the Fair Labor Standards Amendments of 1949, c. 736, 63 Stat. 910, 29 U. S. C. 201 *et seq.*, the pertinent provisions of which are:

> Definitions:
>
> SEC. 3 [63 Stat. 911]. As used in this Act—
>
> * * * * *
>
> (b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.
>
> * * * * *
>
> Maximum Hours:
>
> SEC. 7 [63 Stat. 912]. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.
>
> * * * * *
>
> Investigations, Inspections, Records * * *
>
> SEC. 11 [52 Stat. 1066]. * * * (c) Every employer subject to any provision of this Act or of any order issued under this Act

> shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

QUESTION PRESENTED

Respondent's employees have been engaged in construction work on the Algiers Lock and Canal, a project authorized by Congress under its power to regulate commerce. The project is designed as an improvement to, and an integral part of, the Gulf Intracoastal Waterway, an existing interstate waterway. It has been undertaken in the "interests of eliminating hazards and delays to existing and prospective commerce and for assuring the dependability of the waterway."

The question presented is whether these employees are "engaged in commerce" within the meaning of the Fair Labor Standards Act, or whether work on such projects is excluded from the "commerce" coverage of this Act by reason of the "new construction" doctrine derived from early decisions under the Federal Employers' Liability Act.

STATEMENT

The Secretary of Labor brought this action pursuant to Section 17 of the Fair Labor Standards Act to enjoin respondent from violating the overtime and record-keeping requirements of that Act. The employees in question were employed in the performance of a half-a-million dollar contract awarded to respondent by the United States Corps of Engineers in connection with the construction of the Algiers Lock and Canal project in Orleans Parish, Louisiana.

The Algiers Lock and Canal is to form an integral part of an existing project known as the Gulf Intracoastal Waterway. It is designed to improve and make a faster, safer, and more dependable passage into, out of, and across the Mississippi River at New Orleans than is provided by the present Harvey Lock and Canal alone (district court opinion, R. 53–54). It was recommended by the Corps of Engineers (Sen. Doc. No. 188, 78th Cong., 2d. Sess.), and authorized by Congress under its power to regulate commerce (Rivers and Harbors Act of 1945, c. 19, 59 Stat. 10, 18) in the "interests of eliminating hazards and delays to existing and prospective commerce and for assuring the dependability of the waterway" (Sen. Doc. *supra,* at p. 5).

The Gulf Intercoastal Waterway extends from Apalachee, Florida, to the Mexican border and is an instrumentality of commerce (district court opinion, R. 53). Along the Gulf of Mexico the

doctrine) which characterized the early interpretations of that Act. For example, the statute was narrowly construed as not applying to back-shop employees engaged in making repairs on locomotives and cars. *Bezue* case, *supra.* However, subsequently, under another statute (the Railway Labor Act), these back-shop activities were held to "have such a relation to the other confessedly interstate activities * * * that they are to be regarded as a part of them," *Virginian Railway* v. *System Federation,* 300 U. S. 515, 556.[4]

The Fair Labor Standards Act was adopted after a broader concept of "commerce" had emerged. Thus, in considering the scope of the "commerce" power, the legislators specifically referred to the holding in the *Virginian Railway* case, which had recently been decided by this Court.[5] And in marked contrast to the Employers' Liability Act, which was limited to railroads, the Fair Labor Standards Act was designed for broad national purposes reaching into all indus-

[4] We do not, of course, refer to the *Virginian Railway* case to suggest that the standards of coverage under the Railway Labor Act and the Fair Labor Standards Act are identical, but in order to indicate the evolution of the "commerce" concept in the years following the early Employers Liability Act cases.

[5] Senator (now Mr. Justice) Minton, in the course of a colloquy with Senators Borah and Bailey on the intended scope of the Act's coverage, explicitly pointed out that the Supreme Court had held back-shop employees "to be in commerce." 83 Cong. Rec. 9172.

waterway crosses the Mississippi River at New Orleans. The main route of the waterway at this point now enters the Mississippi from the east through the Industrial Canal, extends upstream 5.5 miles through the harbor of New Orleans, and then leaves the river from the west through the Harvey Lock and Canal (Sen. Doc. *supra,* at p. 3).

New Orleans is a major port for seagoing commerce and the main transshipment terminal for intracoastal barge traffic (Sen. Doc., *supra,* at p. 3). In the 5.5 mile stretch of the waterway through this port intracoastal traffic has to compete with seagoing commerce for room to navigate (district court opinion, R. 53). Moreover, intracoastal traffic itself "has greatly exceeded original expectations" (Sen. Doc. *supra,* at p. 3) and Harvey Lock and Canal, built in 1934 (R. 41), is, as the district court found, "proving inadequate alone to handle" it (R. 53). Since it is not practical to widen the Harvey Lock and Canal because it is located in a highly developed industrial section of the City of New Orleans (Sen. Doc. *supra,* at p. 12; R. 40), Algiers Lock and Canal is being constructed to provide an alternate connection with the Mississippi at a point 4.7 miles downstream from the Industrial Canal (Sen. Doc., *supra,* at p. 4).

The Algiers Lock and Canal will not only eliminate the delays now encountered by intracoastal traffic using the congested Harvey Lock, but it

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tries engaged in interstate commerce. Its objective was not simply "to regulate interstate commerce as such," but "to eliminate, as rapidly as practicable, substandard labor conditions throughout the nation," *Powell* v. *U. S. Cartridge Co., supra,* 339 U. S. at 510. Its "scope was stated in terms of substantial universality" because "[b]readth of coverage was vital to its mission." *Id.,* p. 516.

The rigid doctrine of early Liability Act cases—specifically, the doctrine that new construction of railroad facilities lies outside the realm of "commerce," *Raymond* v. *Chicago, M. & St. P. Ry., supra*—not only need not be carried over into the Fair Labor Standards Act; the decisions of this Court, discussed *supra,* pp. 14–15, affirmatively show that the test of coverage under the latter statute is a different and a "practical" one. That the "new construction" formula has no vitality, at least for purposes of the Fair Labor Standards Act, is further indicated by this Court's decisions, last term, in *Alstate Construction Co.* v. *Durkin,* 345 U. S. 13, and *Thomas* v. *Hempt Bros.,* 345 U. S. 19. The holdings there—that employees engaged in off-the-road manufacture of road materials to be used primarily on interstate roads and railroads were producing goods for commerce—made no effort to distinguish between an end-use in repair and maintenance work and utilization in new road construction. Thus, the opinion in the *Hempt* case (345 U. S. at 20) re-

will provide safer passage across the Mississippi. As the district court recognized, Algiers Point is "very dangerous and hazardous * * * and * * * has been the scene of many, many serious marine casualties" (R. 44). The Algiers Lock and Canal will avoid treacherous Algiers Point and the crowded port of New Orleans (district court opinion, R. 54). Also, this alternate connection with the Mississippi will assure the dependability of the Intracoastal Waterway. As pointed out in the Senate Document covering this project, there is no closed navigation season on the lower Mississippi and the intracoastal waterway during which general overhaul and major repairs to locks may be accomplished without stopping traffic (Sen. Doc., *supra,* at pp. 11–12, 13). Any accident or mishap necessitating the closure of Harvey Lock would interrupt the heavy volume of waterborne commerce using it since only a minor portion of this traffic could be diverted through the smaller alternate west bank connection at Plaquemine, 110 miles upstream from Harvey Lock (*id.* pp. 3, 11–12).

As described in the pertinent Senate Document, the Algiers Lock and Canal project involves the construction of a channel 12 feet deep and 125 feet wide, extending from the right bank of the Mississippi River, at a point 4.7 miles below the Industrial Canal, southwesterly a distance of 9 miles to the Intracoastal Waterway about six miles south

lied in part upon allegations in the complaint that the materials were being produced for "laying and building" the Pennsylvania Turnpike and "to build and erect landing fields" at an airport, as well as for maintenance and repair of road beds. It was the relationship of the employee activities to interstate instrumentalities of commerce which was, without more, controlling. Here that relationship is not less but more direct and immediate. This is not a case of manufacture of materials essential to repair or improvement of an instrumentality of commerce; it involves the improvement of the interstate instrumentality itself.

C. While this Court has not passed upon the application of the Fair Labor Standards Act to persons engaged in the improvement of navigation, the courts of appeals (including the court below) have repeatedly held that employees working on waterway improvement projects certainly no more vital to interstate commerce than the Algiers Lock and Canal are entitled to the protection of the statute. See *Tobin* v. *Pennington-Winter Construction Company*, 198 F. 2d 334 (C. A. 10), certiorari denied, 345 U. S. 915 (construction of a multiple-purpose dam); *Walling* v. *Patton-Tulley Transportation Co.*, 134 F. 2d 945 (C. A. 6) (construction of new dikes and revetments on the Mississippi River); *Ritch* v. *Puget Sound Bridge and Dredging Co.*, 156 F. 2d 334

of Harvey Lock; a lock at the river end, 75 feet wide, 760 feet long and 13 feet deep, with an emergency storage dam; widened forebays at the lock; drainage canals east of the waterway to intercept existing drainage facilities; two pumping plants, two movable highway bridges and a movable railroad bridge across the waterway; a road relocation requiring two fixed bridges over existing canals, and other minor adjustments in local improvements.

Respondent's contract was for the "Earthwork and Emergency Dam Storage," described by its president as "build[ing] guide levees on the Mississippi River on the east end, and backfill[ing] the lock" (R. 51; district court opinion, R. 53). At the time this work was undertaken by respondent, only the concrete work on the locks had been completed (R. 51). The project was still incomplete at the time of trial. Among other things, the earthwork levee which respondent built from the lock structure to the Mississippi levees in Algiers had not been tied in with those levees (R. 49). The canal itself had not been completely dredged (R. 49). Guide levees to the canal still had to be completed and the Mississippi River levees brought up to grade (R. 48–49). Of course, until the project is completed, it cannot be used as a part of the Gulf Intracoastal Waterway (R. 49). But work on the project is continuing and its completion is anticipated (R. 50).

Although the trial court found that the primary purpose of Algiers Lock and Canal is to relieve "the congestion which now obtains in Harvey Lock and Canal [and, in addition] * * * eliminate the necessity of Gulf Intracoastal Waterway traffic navigating the 5.5 miles of the Mississippi River through the crowded harbor of New Orleans and around treacherous Algiers Point" (R. 54), it held that the work falls within the "new construction" doctrine of the early decisions under the Federal Employers' Liability Act, rather than the principles of *Overstreet* v. *North Shore Corp.*, 318 U.S. 125, and *Pedersen* v. *J. F. Fitzgerald Const. Co.*, 318 U.S. 740, 324 U.S. 720, and that respondent's employees could not, therefore, be said to be "engaged in commerce" within the meaning of the Fair Labor Standards Act. The Court of Appeals affirmed in a short *per curiam* opinion (R. 64), which simply expressed agreement with the district judge's opinion, and cited two of its own recent decisions: *Van Klaveren* v. *Killian-House Co.*, 210 F. 2d 510 (involving work on a highway construction project) and *Billeaudeau* v. *Temple Associates, Inc.*, 213 F. 2d 707 (involving work in connection with construction of a housing project).

SUMMARY OF ARGUMENT

The decisions below recognize that the Gulf Intracoastal Waterway is an existing instrumentality of national commerce and that the building

(C. A. 9) (dredging of a new channel and construction of a new pier with retaining walls at Bremerton Harbor); *Tobin* v. *Ramey,* 205 F. 2d 606 (C. A. 5), rehearing denied, 206 F. 2d 505, certiorari denied *sub nom. Hughes Const. Co.* v. *Secretary of Labor,* 346 U. S. 925 (enlargement of a set-back levee, which, though a segment of the Mississippi levee system, was three to six miles from the river's banks). See also *Cuascut* v. *Standard Dredging Corp.,* 94 F. Supp. 197 (D. Puerto Rico) (improvement of San Juan Bay by various dredging jobs).[6]

The *Pennington-Winter* case is particularly close to the case at bar. The work which was held covered there involved the clearing of a reservoir site for a proposed multiple-purpose dam, designed as part of a comprehensive plan for the improvement of the Arkansas and Mississippi Rivers. There, as here, the project had been authorized by Congress under its power to regulate commerce. As in the instant case, the work was not physically in the river bed or waterways to be improved, and the improvement to navigation

[6] Excluding the case under review, the only other waterway improvement case in which a contrary result was reached is *Nieves* v. *Standard Dredging Corporation,* 152 F. 2d 719 (C. A. 1). That case is distinguishable on the ground that it involved work outside the continental United States on the shores of Puerca Bay, Puerto Rico, described in the decision as a "swampy wilderness" which "had never been used in interstate commerce" (152 F. 2d at 721). See in this connection *Cuascut* v. *Standard Dredging Corp., supra,* 94 F. Supp. at 203.

of the Algiers Lock and Canal (the employment activity here involved) will result in an improvement to the Waterway which is vitally and immediately related to its safe and efficient functioning. The district court and the court of appeals were of the view, however, that since the construction was "new construction," rather than maintenance and repair, they were obliged to hold that it was not yet in commerce and hence not subject to the Fair Labor Standards Act.

A. The test of coverage, as enunciated in this Court's decisions, is a "practical" one—whether the work being performed is so "vital to the proper functioning of [existing] instrumentalities of commerce" that it is in substance a part of commerce itself. *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, 130. This requires a realistic appraisal of the particular transactions and operations involved (see *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 567), for purposes of determining the actual integral relationship of the employees' work to interstate commerce. Neither the fact that the employment is in "new construction," rather than in maintenance and repair, nor the fact that the improvement project lies outside the present physical confines of the existing instrumentality of commerce, is dispositive. See *Fitzgerald Co.* v. *Pedersen*, 324 U. S. 720; *Tobin* v. *Pennington-Winter Construction Company*, 198 F. 2d 334 (C. A. 10), certiorari denied, 345 U. S. 915.

It is evident that relief of the congested and dangerous conditions at New Orleans harbor by addition of the new lock and canal will have far more substantial impact on interstate commerce and no less intimate relation to it than such ordinary and incidental activities as might be performed by a maintenance man or a ticket taker employed on the Waterway. Cf. *Overstreet* case, *supra.* It is equally plain that the project is peculiarly "national" in character (cf. *Kirschbaum* v. *Walling,* 316 U. S. 517, 520 *et seq.*); improvement of the navigable waterway is within the exclusive control of Congress and represents an historic function of the federal government. The situation is not comparable to the construction of a factory building which, upon completion, may or may not be dedicated to the production of goods for commerce. Here, the project is of such a nature that it is distinctively related to commerce "from the beginning of construction [by reason of] locality and design," *The Raithmoor,* 241 U. S. 166, 176–177.

B. The courts below erred in applying mechanically the so-called "new construction" doctrine derived from early cases arising under the Federal Employers' Liability Act. "There is no single concept of interstate commerce which can be applied to every federal statute regulating commerce," *McLeod* v. *Threlkeld,* 319 U. S. 491, 495. That doctrine, moreover, was developed when it was the prevailing view that the power

of Congress to regulate the incidents of employment was limited to persons strictly engaged in transportation. The Fair Labor Standards Act was adopted after a broader concept of the commerce power had emerged. Its objective was "to eliminate, as rapidly as practicable, substandard labor conditions throughout the nation," *Powell* v. *U. S. Cartridge Co.,* 339 U. S. 497, 510, and, accordingly, its "scope was stated in terms of substantial universality." *Id.,* p. 516.

That the "new construction" doctrine has no vitality, at least for purposes of the Fair Labor Standards Act, is not only indicated by this Court's decisions, cited *supra,* which declare a different and "practical" test; it is also confirmed by the Court's recent holdings in *Alstate Construction Co.* v. *Durkin,* 345 U. S. 13, and *Thomas* v. *Hempt Bros.,* 345 U. S. 19, which found that employees engaged in the manufacture of road materials were producing goods for commerce. These two cases draw no distinction between an end-use in maintenance and repair of existing interstate highways and utilization in new road construction. The relationship to the existing instrumentalities of interstate commerce was, without more, deemed controlling. In the case at bar, the relationship is not less but more direct and immediate.

C. Examination of cases which have reached the various courts of appeals shows a virtually uniform course of decision treating waterway

improvement projects as within the scope of the statute. In related fields, where the existing instrumentality is not a waterway and where its interstate character may be less patent, cases involving employees engaged in improvement projects have produced varying results. But leading decisions in these fields nonetheless lend further support to the conclusion that, by any practical and realistic test, the employees whose rights are at stake in this proceeding must be held entitled to the protection of the Act.

ARGUMENT

EMPLOYEES ENGAGED IN CONSTRUCTION OF A LOCK AND CANAL VITAL TO THE PROPER FUNCTIONING OF A NATIONAL WATERWAY ARE "ENGAGED IN COMMERCE" WITHIN THE MEANING OF THE FAIR LABOR STANDARDS ACT. IT IS NOT CONTROLLING THAT THE CONSTRUCTION IS "NEW" AND THAT IT LIES OUTSIDE THE BED OF THE EXISTING WATERWAY

There can be no dispute that the construction project involved in this case—the building of the Algiers Lock and Canal—is an improvement essential to the safe and efficient functioning of the existing Gulf Intracoastal Waterway. As the trial court found and as the pertinent engineering report shows, the Waterway's present west bank connection with the Mississippi at New Orleans, which is twenty years old, is inadequate and dangerous, and cannot be subjected to a major repair job without serious interruption of commerce. The new lock and canal will materially

aid commerce by eliminating the hazards and delays encountered by intracoastal traffic in navigating the crowded harbor at New Orleans and treacherous Algiers Point. See Statement, *supra*, pp. 4–6.

The courts below, however, were of the view that the "extremely narrow" question "presented here for adjudication" was whether the building of the Algiers lock and canal "amount[s] to maintenance and repair * * * or is * * * new construction * * *" (R. 54–55). Concluding that the project fell in the latter category, and resting on the "new construction" doctrine derived from cases decided over thirty-seven years ago under the old Federal Employers' Liability Act, they held in substance that the workmen were not engaged in commerce because the project which they were building, being incomplete, was not yet integrated with the existing instrumentality of commerce. The district court's opinion (in which the court of appeals concurred) also seeks to distinguish various cases which involved the new construction of improvements, rather than maintenance and repair work, on the ground that in those cases the improvement was located within the physical framework of the existing instrumentality of commerce (R. 55).

We shall urge that this approach misconceives the correct test, as enunciated by this Court, and that it mistakenly follows artificial rules which are neither binding under the Fair Labor Stand-

ards Act nor consonant with that statute's declared purposes. We shall point out further that, in comparable and related situations, various courts of appeals have applied the "practical" test which we think is required by this Court's decisions, and that the results reached in those cases are inconsistent in principle with the ~~test which we think is required by this Court's~~ decision below.

A. In *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 567, and again in *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, 128, this Court stated: "'It is clear that the purpose of the [Fair Labor Standards] Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce.' And in determining what constitutes 'commerce' or 'engaged in commerce' we are guided by practical considerations." The Court accordingly held, in *Overstreet,* that the employees there involved (a ticket-taker, a draw-bridge operator, and a repair man employed by the owner of a private toll road and drawbridge) were "engaged in commerce" because their work was "vital to the proper functioning" of instrumentalities of commerce (p. 130). "The work of each petitioner in providing a means of interstate transportation and communication is so intimately related to interstate commerce," the Court declared, "'as to be in practice and in legal contemplation a part of it'" (*ibid.*). And see *Fitzgerald Co.* v. *Pedersen,* 324 U. S. 720, 724, in which the Court applied these principles

to employee activities relating to the repair of the substructures of two railroad bridges and to the building of "entirely new abutments" under two other such bridges.[1]

In similar vein, this Court has repeatedly admonished that there is no mechanical test or "touchstone" and that the broad statutory objectives should not be frustrated by "too narrow a construction." See *Kirschbaum* v. *Walling*, 316 U. S. 517, 520-521; *Walling* v. *Jacksonville Paper Co.*, *supra*, 317 U. S. at 567; *Powell* v. *U. S. Cartridge Co.*, 339 U. S. 497, 516–517. The courts are to be guided by such "practical considerations" as the actual integral relationship of the employees' work to the interstate commerce, and the "national" as distinguished from the "purely local" character of the work. *Kirschbaum* v. *Walling*, *supra*, 316 U. S. at 521 *et seq.*; *Overstreet*, *supra*, 318 U. S. at 128. "[T]he policy of Congressional abnegation with respect to occupations affecting commerce is no reason for narrowly circumscribing the phrase 'engaged in commerce.'" *Overstreet*, at 128.

As a practical matter, it is evident that the improvement of the Gulf Intracoastal Waterway by the construction of a new lock and canal relieving congestion at the New Orleans harbor will have far more substantial impact on inter-

[1] In *Pedersen*, an argument based upon "new construction" was pressed by the employer. See No. 396, October Term, 1942, Br. in Op., pp. 5, 10.

maintenance or improvement; whether it involves construction or reconstruction; whether it aims at a mere enlargement or a distinct addition; whether the project lies within the physical confines of the existing instrumentality as it is now constituted or outside of it. The test, as indicated above, is whether the work is so directly and vitally concerned with the functioning of an instrumentality of interstate commerce as to be, practically speaking, a part of that commerce rather than a "purely local" activity. And if that is so, the employees of this lock and canal project, who are directly engaged in constructing essential improvements to an existing national artery of commerce, must be deemed fully within the protection of the statute.

B. In applying the doctrine of early Federal Employers' Liability Act cases to the issue of coverage under the Fair Labor Standards Act, the decision below appears to have ignored this Court's statement in *Overstreet* that the two Acts, though similar in some respect, "are not strictly analogous" (318 U. S. at 131), and its caution in *McLeod* v. *Threlkeld*, 319 U. S. 491, 495: "There is no single concept of interstate commerce which can be applied to every federal statute regulating commerce * * *. The effect of the over-refinement of factual situations which hampered the application of the Federal Employers' Liability Act, prior to the recent amendment, we hope, is

not to be repeated in the administration and operation of the Fair Labor Standards Act."[3]

The earlier statute was, of course, restricted to the interstate transportation operations of railroads. Indeed, it was then the prevailing view that the power of Congress to regulate the incidents of employment was confined to employees strictly engaged in "transportation" (see *Employers' Liability Cases,* 207 U. S. 463; *Raymond* v. *Chicago, M. & St. P. Ry.,* 243 U. S. 43; *New York, N. H. & H. R. Co.* v. *Bezue,* 284 U. S. 415)—a view which produced many of the over-refinements (including the "new construction"

[3] A number of cases have similarly relied upon doctrine derived from Federal Employers' Liability Act cases in considering the application of the Fair Labor Standards Act to the new construction of roads to be connected with an interstate highway system. *Van Klaveren* v. *Killian-House Co.*, 210 F. 2d 510 (C. A. 5); *Koepfle* v. *Garavaglia*, 200 F. 2d 191 (C. A. 6); *Moss* v. *Gillioz Construction Co.*, 206 F. 2d 819 (C. A. 10). But see *Walling* v. *McCrady Construction Co.*, 165 F. 2d 932 (C. A. 3), certiorari denied, 329 U. S. 785; *Bennett* v. *V. P. Loftis Co.*, 167 F. 2d 286 (C. A. 4). As pointed out in the petition for certiorari, the instant case is accordingly significant not only from the standpoint of employees engaged in the improvement of navigable streams and waterways but also from the standpoint of many employees engaged in road-building. This is not to say, of course, that all road construction cases fall readily in the same basket as the instant case. In contrast to the situation here, in which the only purpose served by the construction is improvement of an exclusively national artery of commerce, road construction serving the needs of interstate travel ordinarily benefits local traffic as well. In the latter class of cases, there may frequently be a factual issue as to the substantiality of the interstate aspects.

awaited completion of the project.[7] The trial court had held that "new construction of an instrumentality of interstate commerce is not covered by the Fair Labor Standards Act" (see 10 WH cases 506; 20 Labor Cases Para. 66705 (E. D. Okla., 1951) (not otherwise reported)). But the Tenth Circuit, pointing to the fact that the proposed dam was part of a developmental plan, reversed on the ground that the construction, though "new," was plainly "an improvement of an existing project for the control of floods and the betterment of navigation" (198 F. 2d at 336).[8]

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[7] The dam and reservoir project in *Pennington-Winter* was certainly no more immediately related to commerce than the Algiers Lock and Canal project. The dam was to be located on a non-navigable tributary of the Arkansas River some thirteen miles upstream from the confluence of the rivers whose navigability was to be improved by the dam, and its beneficial effect upon navigability depended largely upon the construction of a number of other similar tributary projects proposed in a comprehensive plan to be carried out over a period of years. Here, the lock and canal is to be physically connected, at both ends, with the existing Gulf Intracoastal Waterway and is to be an integrated link in the navigable waterway itself. Moreover, in *Pennington-Winter* the dam was designed to serve various purposes (electric power, flood control, recreation) in addition to improving the navigability of the affected waters. Here, the sole function of the project is improvement of an existing artery of commerce.

[8] The court further observed (see note 2, p. 17, *supra*) that the situation had nothing in common with the construction of a new building which, upon completion, might or might not be dedicated to the production of goods for commerce.

In *Patton-Tulley, supra,* the trial court had similarly denied coverage on the ground that the "construction of a facility not yet employed in interstate commerce was not engagement in such commerce" (134 F. 2d at 947). But, since the new dikes and revetments were designed to aid navigation on the Mississippi, the Sixth Circuit reversed, stating (*ibid.*): "The short answer is that the Mississippi River has been a highway of interstate commerce since states were first carved out of its contributory territory * * *."

In the *Puget Sound* case, *supra,* the Ninth Circuit emphasized that "the facility worked on need not be employed in commerce during its construction" (156 F. 2d at 336). The facts held to provide a basis for coverage there were that the new channels would improve Bremerton Harbor by extending its previously navigable portion, and that the new pier and retaining walls were "an addition to other such facilities of the Navy Yard" on Puget Sound (p. 335).

In *Tobin* v. *Ramey, supra,* the job was to enlarge a set-back levee for the Mississippi—work which the trial court had found "would have only a remote influence on the channel of navigation" (*Tobin* v. *Ramey,* 106 F. Supp. 349, 352 (W. D. La.)). In holding the Act applicable, the Fifth Circuit stressed the fact that the levee was a segment of the levee system for the main channel of the Mississippi and that it was constructed and later expanded pursuant to a comprehensive plan

for the development of the entire river (205 F. 2d at 607).[8]

Realistically viewed, it is plain that the work here is no less "intimately related to interstate commerce" and no less "a part of it" (*Overstreet, supra,* 318 U. S. at 128, 130) than the activities held covered in the above cases. Like the new multiple-purpose dam in *Pennington-Winter,* the new dikes and revetments in *Patton-Tulley,* the new channels and pier in *Puget Sound,* and the set-back levee in *Ramey,* the lock and canal here is designed to improve an existing navigable waterway. This being so, the fact that new construction is involved and that it will not be used until completed should not preclude application of the Act here any more than it did in those situations.

Cases presenting similar issues but involving improvement projects unrelated to waterways have produced varying results. See note 3, p. 19, *supra.* This may well be explained, at least in large part, by the fact that while navigation improvement is readily seen as an activity palpably "national" in character, the improvement, by new construction, of other types of facilities is apt to present a picture in which the interstate aspects are less sharply defined. Nonetheless, the courts of appeals, guided by practical considera-

[8] In other contexts, this Court has emphasized the need to view waterway projects as a whole and not as isolated segments. *United States* v. *Appalachian Power Co.,* 311 U. S. 377; *Oklahoma* v. *Atkinson Co.,* 313 U. S. 508.

tions, have frequently held that improvement of other types of instrumentalities of commerce is so directly and vitally related to commerce as to be deemed a part of it. See, *e. g., Bennett* v. *V. P. Loftis Co.,* 167 F. 2d 286 (C. A. 4) (highway improvement project involving the construction of a new bridge and new connecting roads); *Walling* v. *McCrady Construction Co.,* 156 F. 2d 932 (C. A. 3), certiorari denied, 329 U. S. 785 (various projects including, among others, extension of a telephone system by laying a new conduit, erection of "new bridges in different locations from the old with new approaches to one of them," and construction of "foundations for a new signal tower" (156 F. 2d at 933-934)); *Mitchell* v. *Chambers Construction Co.,* 214 F. 2d 515 (C. A. 10) (construction of a new reservoir and chlorinator house to augment an existing municipal water system). See, also, comment, 60 Harv. L. Rev. 154.

In the *Loftis* case, *supra,* where coverage was resisted on the ground that the bridge "was a new structure, and no traffic passed over it during the period of its construction" (167 F. 2d at 287), the Fourth Circuit succinctly stated (p. 288): "If the declared purpose of the Act is to be accomplished, a project should be considered as a whole, in a realistic way; not broken down into its various phases so as to defeat the purpose of the Act. This latter unrealistic approach was condemned by the Supreme Court in *Walling* v. *Jacksonville Paper Co.,* 317 U. S. 564 * * *."

Similarly, in the *McCrady* case, *supra*, the Third Circuit rejected the contractor's argument that those projects involving new construction would not constitute commerce until actually put into use. It saw "no force in these ingenious distinctions," pointing out that "new abutments to the bridges in the *Pedersen* case [*Pedersen* v. *Fitzgerald Co.*, 318 U. S. 740, 324 U. S. 720] construed as being under the Act were of the type of so-called 'new construction' the appellant performed carrying out its contracts" (156 F. 2d at 936). With particular reference to the conduit and signal tower jobs, the court observed that "while not reconstruction jobs [they] were so closely allied, the first to the existing telephone system and the second to the railroad as to come well within the *Pedersen* rule" (*ibid.*).

The *Chambers Construction Co.* case involved the construction, at a new location, of a new reservoir and chlorinator house which, upon completion, were to be connected by pipeline with an existing municipal water system. The system served, *inter alia*, customers engaged in commerce and producing goods for commerce. The court of appeals, though it sustained on other grounds the district court's failure to grant an injunction against the employer, indicated its view that the construction, being designed to augment the existing water system, bore a sufficiently direct and integral relation to commerce to come within the statute. See 214 F. 2d at 517.

CONCLUSION

The recognized purposes and objectives of the Fair Labor Standards Act, the decisions of this Court enunciating the applicable criteria of coverage, and leading decisions of the courts of appeals applying these criteria, alike support the conclusion that the employees whose rights are at stake in this proceeding are entitled to the protection of the statute. Unquestionably, they have been engaged in an improvement project which is vitally and immediately related to the safe and efficient functioning of an existing artery of national commerce. No more can be required to demonstrate that employees are "engaged in commerce" within the meaning of the Act. The judgment of the court of appeals should be reversed and the case remanded to the district court for entry of an appropriate decree.

Respectfully submitted.

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OCTOBER TERM, 1954

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

C. W. VOLLMER & COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR PETITIONER IN RESPONSE TO THE COURT'S ORDER OF MAY 9, 1955, SUGGESTING THAT THE ACTION MAY BE MOOT

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 387

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

C. W. VOLLMER & COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR PETITIONER IN RESPONSE TO THE COURT'S ORDER OF MAY 9, 1955, SUGGESTING THAT THE ACTION MAY BE MOOT

The Solicitor General, on behalf of petitioner, respectfully submits that the fact that respondent has completed its part of the work on the waterway improvement project in issue here does not render the controversy moot, and further that this Court not only has jurisdiction to proceed with the determination of the case on the merits, but should do so

in furtherance of the public interest which petitioner represents.

1. This is not a case where the practices sought to be enjoined are not likely to recur as was the situation in *Commercial Cable Co.* v. *Burleson*, 250 U. S. 360. The action there was a suit to enjoin Federal officers from seizing property under a challenged presidential proclamation issued as a temporary wartime measure in 1918. At the time this Court held the case to be moot, hostilities had ended and the property had been returned to its owners.[1] Here, in contrast, we are dealing with a continuing regulatory statute whose constitutionality was long ago upheld by this Court (*United States* v. *Darby*, 312 U. S. 100) and with a defendant who has admittedly no intention of complying with the statute until compelled to do so by a court decision. In this case, therefore, the "cognizable danger of recurrent violations" spoken of in *United States* v. *W. T. Grant Co.*, 345 U. S. 629, at 633, is clearly present.

As the attached affidavit shows,[2] respondent is a going construction firm which has been in business since January 1947 (App., *Infra*). During the past five years, it has had more than a dozen contracts or subcontracts for the performance of earthwork on various waterway projects, many of which have

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[1] Compare *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, No. 28, Oct. Term 1954, decided May 9, 1955, in which an Iowa statute had made it very unlikely that the issue would recur.

[2] The original affidavit has been filed with the Clerk.

been in connection with the Mississippi River and the interrelated Intracoastal Canal System. There is no indication that respondent expects to cease taking such contracts. On the contrary, in its memorandum of May 10, 1955, on the mootness point, respondent frankly asserts its intention to continue to bid on them. There is thus every reason to believe that respondent will engage in work similar to that which gave rise to this litigation. And it is virtually certain, unless the decision below is reversed, that violations of the Act will recur when this happens. Respondent has never expressed, or even intimated, an intent to comply with the Act. On the contrary, it has steadfastly maintained that compliance is not required of it.

This case is thus similar to *Carpenters Union* v. *Labor Board*, 341 U. S. 707, 715, in which it was held that the case had not been rendered moot by the completion of the construction project which gave rise to the litigation. Here, as there, though the challenged practices occurred in the performance of a contract which has since been completed, these practices are merely "a sample of what might be repeated elsewhere if not prohibited."

This situation also closely resembles *Walling* v. *Haile Gold Mines*, 136 F. 2d 102 (C. A. 4) and *Tobin* v. *Ramey*, 205 F. 2d 606, rehearing denied 208 F. 2d 505 (C. A. 5), certiorari denied, 346 U. S. 925, in both of which cases, despite claims of mootness, the appellate court reversed the denial of relief in actions under the Fair Labor Standards Act. In the *Haile* case it was claimed that the case

was moot because the employer's gold mine had been dismantled and closed down indefinitely during the War. The Fourth Circuit, reversing the trial court's denial of relief on the merits, said:

> It is familiar law that the discontinuation of an illegal practice by a defendant (either by going out of business or otherwise) after the institution of legal proceedings against the defendant by a public agency, does not render the controversy moot. * * * Nor is a case rendered moot where there is a need for the determination of a question of law to serve as a guide to the public agency which may be called upon to act again in the same matter. * * * The possibility of future violations of the Act by Haile is very much with us and not merely within the realm of prophecy. Moreover, an adjudication on the merits by us at this time will finally resolve the instant dispute and obviate the need for, and the expense of, repetitious litigation in the future if, as, and when Haile resumes mining operations [136 F. 2d at 105]

Similarly in *Tobin* v. *Ramey*, the Fifth Circuit reversed the trial court on the merits of the coverage issue, and rejected the employer's claim that the case was moot because he had completed the particular levee project there involved and had sold his equipment and had no present intention of bidding on similar contracts. The instant case is even stronger than *Ramey* since respondent is con-

tinuing in business and has definitely advanced its intention to bid on similar contracts.

Clearly, therefore, particularly in view of the public interest which petitioner represents, the case falls within the principles of this Court's decisions which are succinctly summarized in the *W. T. Grant* case:

> * * * [The] voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i. e.*, does not make the case moot. *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290 (1897); *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37 (1944); *Hecht Co.* v. *Bowles*, 321 U. S. 321 (1944). A controversy may remain to be settled in such circumstances. *United States* v. *Aluminum Co. of America*, 147 F. 2d 416, 448 (1945), *e. g.*, a dispute over the legality of the challenged practices. *Walling* v. *Helmerich & Payne, Inc., supra; Carpenters Union* v. *Labor Board*, 341 U. S. 707, 715 (1951). The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. * * * [345 U. S. at 632].

2. Even if respondent were not a going construction firm with every intention of performing other work on waterway improvement projects, it would not follow that the action or the issues would be moot. *Walling* v. *James V. Reuter, Inc.*, 321 U. S.

67; see also *Mitchell* v. *Joyce Agency, Inc.*, 348 U. S. 945; *United States* v. *W. T. Grant Co., supra.* In the *Reuter* case, this Court held that even the dissolution of the corporation sought to be enjoined under the Fair Labor Standards Act does not render the action moot. "The validity of the judgment in such a case", said the Court, "survives the dissolution of the corporation defendant. * * * And these principles may be applied in fuller measure in furtherance of the public interest, which here the petitioner represents, than if only private interest were involved" (*Id.*, at 674- 675).

There are special reasons why mere completion of a particular construction project should not be held to moot the issue of the applicability of a Federal regulatory statute such as the Fair Labor Standards Act. The nature of the construction industry is such that it would be virtually immune from enforcement proceedings if litigation must be completed before the completion of a particular construction job, since the majority of construction contracts are completed within a relatively short period of time. Governmental enforcement procedure and litigation, by contrast, is necessarily a rather protracted process. Not only is there usually a lapse of time before violations are brought to the attention of the enforcement agency, but time must be taken to investigate, and in most cases to negotiate for voluntary compliance. This is in addition to the time consumed in taking the necessary steps to prepare the case for legal action, and even further delay is often encountered be-

cause of the crowded condition of many court dockets and of course the delay necessarily incident to appellate review.[3] Thus a holding that litigation is mooted upon completion of the particular construction job out of which the violations arose would frustrate enforcement proceedings and make it almost impossible for the Government ever to secure authoritative determination of the Act's applicability to this type of work.

Whether the Act does apply to work similar to that involved here is a question of great importance not only to petitioner but to the entire construction industry as well. As pointed out in the petition for certiorari, Congress has authorized hundreds of waterway improvement projects and appropriated huge sums of money for their prosecution. Work on waterway projects, however, is usually undertaken by more than one contractor, and the various contractors, as a general rule, complete their part of the work in relatively short periods of time. It is important that there be an authoritative determination of the issue whether the Act applies in

[3] The present case is a good illustration of the problem. The violations alleged to have occurred in the case were found on an investigation made four months after respondent commenced work upon the project. Negotiations toward voluntary compliance were conducted with respondent's legal counsel over a period of approximately five more months. Finally, after respondent's insistence that the Act was inapplicable, a complaint was filed on December 5, 1951. Trial upon the issues, however, was not reached on the court docket until some eighteen months later. During all but about five months of the time the case was pending trial on the district court docket, respondent was still engaged in work upon the Algiers project.

this large area of employment. This case, which squarely presents the issue and which has already been fully briefed and argued in this Court, seems the most appropriate vehicle for such determination. Cf. *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 515-516.

Respectfully submitted,

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MAY, 1955.

APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 387

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

C. W. VOLLMER & COMPANY, INC., RESPONDENT

AFFIDAVIT

STATE OF TEXAS,
County of Dallas.

Earl Street, being duly sworn, deposes and says that he is, and at all times during the pendency of the above styled cause has been, employed by the United States Department of Labor as Regional Attorney at Dallas, Texas, and upon information and belief further says that:

(1) Respondent C. W. Vollmer & Company, Inc., was incorporated under the laws of the State of Texas by charter issued by the Secretary of State of the State of Texas on January 4, 1947. Since that date it has been and is engaged in the construction business, including construction in connection with heavy engineering projects and utility projections.

(2) On September 13, 1949, respondent was issued a permit to do business in the State of Louisiana by the Secretary of State and since that date it has been and is engaged in the type of business hereinafter shown.

Respondent has and maintains a field office located at Peters Road, Harvey, Louisiana, at which it maintains an office, shop and various equipment. Respondent's name is listed in the advertising section of the telephone directory under the heading "Contractors, Excavating and General Contracting."

Respondent and its employees have performed work in connection with the following contracts:

(a) Contract No. DA-16-047-eng-1508. Furnishing earth work to strengthen and rebuild an existing levee on the Mississippi River north of the City of New Orleans at what is known as Deer Ranch, Harlem and Lower Harlem Levees. Work period—November 24, 1951 to January 1, 1952.

(b) Contract No. DA-16-047-eng-1754. Earth work including the grading, strengthening and rebuilding of existing levees known as Empire Levee and Orange Farm Levee on the Mississippi River about twenty miles south of the City of New Orleans. Work period—October 14, 1952, to December 22, 1952.

(c) Contract No. DA-16-047-eng-2724. As subcontractor under Atlas Construction Company at Vidalia, Louisiana, stock-piling of materials consisting of sand, gravel and soil for the closure of Bayou Boeuf, a part of the Bayou Boeuf lock ap-

proach channel of the Atchafalaya River basin. This river is a navigable stream and the work was to aid navigation and for flood control. Work period—March 21, 1954 to May 30, 1954.

(d) Contract No. DA-16-047-eng-1856. As subcontractor under Keller Construction Company, New Orleans, Louisiana. Work consisted of supplying of sub-surface material, principally earth work for construction of a pumping station known as Orleans-Plaquemine Station, located at the conjunction of the Mississippi River and the Intracoastal Canal, part of the Algiers Lock project. Work period—July 24, 1952 to June 16, 1954.

(e) Contract No. DA-16-047-eng-1856. As subcontractor under Keller Construction Company; work in connection with the construction of a pumping station known as Orleans Parish Pumping Station erected to relieve the overflow of water occasioned by the Algiers Lock Project. Work period—August 15, 1952 to June 9, 1954.

(f) Contract No. DA-22-052-eng-3281. Work consisted of clearing the Grenada Reservoir site on the Yalabusha River in Mississippi. Yalabusha River is a tributary of the Yazoo River which flows into the Mississippi River near Vicksburg. Work period—May 1, 1952 to September 18, 1953.

(g) Contract No. DA-22-052-eng-4115. Construction of a new levee on the back waters of Red River from Dumbarton to Lake St. John. Work period—July 22, 1953 to October 1, 1954.

(h) Contract No. DA-22-052-eng-4792. Construction of a levee on the Red River back water

for the Buckner Bayou Diversion for flood control. Work began October 13, 1954 and not yet completed.

(i) Contract No. Noy-71-470. Construction of a magazine at the Naval Ammunition Depot at Shumaker, Arkansas. Work period—March 31, 1952 to July 6, 1953.

(j) Contract No. Noy-71-471. Construction of a magazine at the Naval Ammunition Depot at Shumaker, Arkansas. Work period—March 31, 1952 to July 6, 1953.

(k) Contract with Board of Levee Commissioners of the Orleans Levee District, New Orleans, Louisiana, for the topping of approximately 1,000 ft. of levee at Nestor Canal and the construction of approximately 1,000 ft. of wooden revetment, all in what is called Bohemia Spillway in Plaquemine Parish, Louisiana, for the control of Mississippi River flood water. Work period—December 20, 1949 to January 31, 1951.

(l) Contract with Board of Levee Commissioners of Orleans Levee District, New Orleans, Louisiana, for topping sections of levee between Bayou Lomoque and Ostrica for the building of a revetment at Ostrica and the raising and repairing of the revetment at Tabony Pass, in the Bohemia Spillway area for the control of Mississippi River flood waters. Work period—November 29, 1950 to March 15, 1951.

(m) Contract with the Board of Levee Commissioners of the Orleans Levee District, New Orleans, Louisiana, for the construction of approximately

53,000 cubic yards of earthen levee and approximately 1,250 lineal feet of wooden bulkhead in the vicinity of the Higgins Plant at Michaud, Louisiana, on a stream which is part of the Intracoastal Canal System. Work period—April 9, 1951 to September 10, 1951.

(n) Contract with the Board of Levee Commissioners of the Orleans Levee District, New Orleans, Louisiana, for the re-shaping of approximately 25,350 lineal feet of earthen levee on the north bank of the Intracoastal Canal from the Industrial Canal to Paris Road in the City of New Orleans. Work period—April 23, 1951 to September 22, 1951.

(o) Contract with the Board of Levee Commissioners of the Orleans Levee District, New Orleans, Louisiana, for the topping of the Florida Avenue Canal Levee, a part of the drainage system of the City of New Orleans, from the pumping station to Fisherman's Canal. Work period—January 2, 1953 to April 11, 1953.

(p) Contract with the Board of Levee Commissioners of the Orleans Levee District, New Orleans, Louisiana, for enlarging and reshaping of approximtaely 44,000 lineal feet of levee in the Third Levee District on the Intracoastal Canal from the Industrial Canal to the Higgins Plant at Michaud, Louisiana. Work period—Began September 7, 1954, scheduled to have been completed March 19, 1955.

(3) On this, the 10th day of May, 1955, there was received in the office of the Wage and Hour and

Public Contracts Divisions at New Orleans, Louisiana, a letter postmarked April 29, 1955 at Ferriday, Louisiana, which letter is in substance as follows:

"Ferriday, Louisiana
April 27, 1954 [Sic]

Mr. Williamson
Representative Wage and Hour Division
United States Dept. of Labor
Alexandria, La.

Mr. Williamson:

I am writing you to find out about working hours per week. I thought it was a law to not work over 40 hours per week and all over 40 hours a week was time and a half. On other drainage jobs I worked on I got time and half over 40 hours a week. I have been working for this contractor since November 1954 working 56 hours a week with no overtime. I have my check stubs to prove this and so has everyone else on this job. We all feel we should be getting overtime. They say that this job don't have to pay overtime unless you work over 8 hours a day. If that's the case, why does everyone else pay overtime. Would like for you to answer my letter explaining to me why we don't get overtime. I work for C. W. Vollmer, Clayton, Louisiana. The drainage job is here at Ferriday, Louisiana. He shouldn't be no exception. If you have doubt to what I told you, ask any man on the job and there is plenty work. We all have our check stubs to prove it. I am going to give you my name and

address. I don't want my name mentioned. Thank you.

Yours truly,

(Signature and address deleted)."

(S.) EARL STREET,
Regional Attorney.

Subscribed and sworn to before me, the undersigned authority in my aforesaid jurisdiction, on this the 10th day of May, 1955.

(S.) KATHERINE LAIN,
[SEAL.] *Notary Public.*
My Commission expires: June 1, 1955.

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Supreme Court of the United States

October Term, 1954

No. 387

JAMES P. MITCHELL, SECRETARY OF LABOR UNITED STATES DEPARTMENT OF LABOR

Petitioner

versus

C. W. VOLLMER & CO., INC.

Respondent

On Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENT

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SUPREME COURT OF THE UNITED STATES

October Term, 1954

No. 387

JAMES P. MITCHELL, SECRETARY OF LABOR UNITED STATES DEPARTMENT OF LABOR
Petitioner

versus

C. W. VOLLMER & CO., INC.
Respondent

On Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENT

QUESTION PRESENTED

The question presented for review is whether employees engaged in initial construction of a lock for a proposed new canal, which, if completed and connected to existing navigable interstate waterways, will become a new navigable waterway in interstate commerce, are "en-

gaged in commerce" within the purview of the Fair Labor Standards Act, or are not included therein because at the time their work was performed, the lock and the canal had never been susceptible of use in interstate commerce.

STATEMENT OF THE CASE

Petitioner brought this action to enjoin respondent from violating the overtime and record-keeping provisions of the Fair Labor Standards Act.[1] The district court denied this relief on the ground that respondent's employees were not within the coverage of the Act.[2] The court of appeals affirmed this holding,[3] and this court granted certiorari.[4]

The employees of respondent whose work is the subject of this action, were employed in the performance of a contract between respondent and the United States for initial construction of an earthwork embankment and concrete platform, and derrick footings for emergency dam storage, for Algiers Lock, in the Parish of Orleans, Louisiana.[5]

The lock is being constructed as part of a proposed new canal, which is to provide an alternate connection between the Mississippi River (at a point 4.7 miles downstream from the Industrial Canal at New Orleans) and the existing Gulf Intracoastal Waterway (at a point a

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[1] 29 USC 207(a), 211(c), and 215(a)(2)(5).
[2] R 53-57, 113 FS 235 (1953).
[3] R 64, 214 F2d 132 (1954).
[4] 348 US 886.
[5] Plaintiff's Exhibit 7 (contract) and 8 (specifications).

short distance west of its juncture with the Harvey Canal, which provides one of the three present connections).[6]

The proposed new canal will be a land cut, nine miles long,[7] and will not follow any pre-existing route.[8] When and if completed,[9] it will not replace any existing canal or other navigable waterway;[10] but, when and if connected with the present Gulf Intracoastal Waterway and the Mississippi River, the proposed canal will provide a completely new, alternate route for vessels which desire to by-pass the Port of New Orleans.[11]

When and if completed and placed in service, the new lock and canal are expected to provide through east-west water traffic on the Gulf Intracoastal Waterway, with by-passage around the port of New Orleans, faster and safer than now provided through the port by the Mississippi River between the existing Harvey Lock and Canal and the Industrial Canal.[12] This new alternate con-

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[6] Sen. Doc. No. 188, 78th Cong., 2d Sess. (Plaintiff's Exhibit 6), pp. 4, 12. One of the other alternate connections, 58 miles in length, leads from the River, at Plaquemine, Louisiana, approximately 110 miles up-stream from New Orleans, to the Waterway, at Morgan City, Louisiana, approximately 100 miles westerly of New Orleans (Sen. Doc. No. 188, p. 3; see R 48). The third alternate connection is the Atchafalaya River, which connects the Waterway at Morgan City with the Mississippi River near Simmesport, Louisiana, up-stream from Baton Rouge, Louisiana, at the confluence of the Atchafalaya, Red and Old Rivers.

[7] Sen. Doc. No. 188, p. 12.

[8] *Ibid.*, also R 51, 54.

[9] See footnote 18, *post*.

[10] R 49, 54. Sen. Doc. No. 188 describes the project as an "alternate connection".

[11] R 40, 42, 54; Sen. Doc. No. 188, p. 4.

[12] Sen. Doc. No. 188, p. 4. North-bound traffic from the west is expected to continue to utilize the present alternate connections provided by the Atchafalaya River, the Plaquemine Lock and Canal and the Harvey Lock and Canal. North-bound traffic from the east is expected to continue its present practice of continuing up the River after leaving the Industrial Canal (R 41, 42, 48).

nection also is expected to increase the dependability of the waterway by providing an alternate route should the Harvey Lock and Canal become inoperative.[11]

When the work here in question was performed, the lock structure itself had only been built partially, the canal had not yet been excavated, and construction of other parts of the project had not yet even been undertaken;[14] so that no portion of the project had ever been, or could in fact ever have been, used in commerce.[15]

Although Congressional authority for the project had been granted,[16] appropriations for financing its construction were inadequate;[17] and completion of the project for actual use was, at the time respondent completed its contract, subject to further appropriations by the Congress.[18]

SUMMARY OF ARGUMENT

When Congress enacted the Fair Labor Standards Act to apply to employees "engaged in commerce or in the production of goods for commerce", it refrained from defining these terms, and purposefully left to the courts the independent responsibility of delineating the scope to be given to the Act's jurisdictional standards.

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[13] Sen. Doc. No. 188, pp. 4, 5; 13.
[14] R 48-51, 54, 57.
[15] R 36, 48-57.
[16] Act of March 2, 1945, c. 19., P.L. 14 (Rivers and Harbors Act, 1945).
[17] R 50.
[18] R 46-47, 50; Plaintiff's Exhibit 8 (specifications), pp. 8-9.

Thus called upon to determine the extent of the "engaged-in-commerce" concept of the Act, this court adopted, and has since followed, the "practical test" evolved in cases arising under the Federal Employers' Liability Act.

That test is not whether the activities of the employee affect commerce, but whether they actually are "in" or "so closely related as to be in practice and in legal contemplation a part of" interstate commerce.

Judged by that practical test, employees engaged in the construction of new facilities not yet susceptible of use in interstate commerce, though intended ultimately for such use, are not "engaged in commerce" within the purview of the Act.

This result is in harmony with past decisions of this court, the near-unanimous opinions of the lower federal courts, and the intention of Congress that the Act be not applied to employees whose work is essentially local.

ARGUMENT

Background

When Congress enacted the Fair Labor Standards Act, it "did not choose to exert its power (over commerce) to the full by regulating industries and occupations which affect commerce";[19] and expressly refused to extend the

[19] *Overstreet vs North Shore Corp.*, 318 US 125, 128 (1943). See also: *Kirschbaum vs Walling*, 316 US 517, 522-23 (1942); *Walling vs Jacksonville Paper Co.*, 317 US 564 (1943); *McLeod vs Threlkeld*, 319 US 491, 493 (1943).

Act to employees "engaged in commerce (or) in any industry affecting commerce", or in the "interstate production (of goods) which competed with goods produced in another state".[20]

Congress also rejected a proposal to extend the Act to "occupations in interstate commerce, in the production of goods for interstate commerce, or otherwise directly affecting interstate commerce";[21] and, beyond doubt, the ultimate "selection of the smaller groups" in establishing the jurisdiction of the Act "was deliberate and purposeful".[22]

For various reasons recorded in the legislative debates, Congress deliberately refrained from defining the scope of the Act with any degree of particularity, and left to the courts "the independent responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of industrial situations".[23]

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[20] *Kirschbaum vs Walling*, 316 US at 522-23. Constitutional power to extend the Act over such employees had already been recognized in *Virginian Railway Co. vs Federation*, 300 US 515 (1937), and *Labor Board vs Jones & Laughlin*, 301 US 1 (1937), and some members of the Congress even predicted that this court would use these decisions as a guide in defining the scope of the act as first proposed: Senator Wagner stated, "My prediction is that the same workers who the courts have held to be in or directly affecting interstate commerce under the National Labor Relations Act will be regarded as subject to the federal commerce power under the provisions of the bill which we are now considering". *83 Cong. Rec., 75th Cong., 3rd Sess.*, p. 9173. Senator (now Mr. Justice) Minton had made the same prediction (*Id.*, at pp. 9170-72). Congressional rejection of this fringe coverage carried with it the annulment of this prediction. Petitioner concedes as much (petition for certiorari, p. 20, footnote 6).

[21] *83 Cong. Rec., 75th Cong., 3rd Sess.*, pp. 7373-7448.

[22] *McLeod vs Threlkeld*, 319 US at 493.

[23] *Kirschbaum vs Walling*, 316 US at 523. *83 Cong. Rec., 75th Cong., 3rd Sess.*, pp. 9168, 9173.

This court has accordingly been required to "mark out the extent to which Congress has exercised its Constitutional power over commerce",[24] and, in several decisions, the court has stated in practical terms the rules by which the jurisdictional standards of the Act are to be construed.

As the instant case is not concerned with coverage of the Act over employees engaged in the "production of goods for commerce", it is material to consider only those precedents dealing with application of the statute to employees "engaged in commerce".

In *Overstreet vs North Shore Corporation*, this court first undertook to define judicially the scope of the term, "engaged in commerce", as it is used in the Fair Labor Standards Act.[25]

Consistent with its previous decisions,[26] the court held that Congress did not intend the Act to extend to all employment subject to its power over commerce, "and in determining what constitutes 'commerce' or 'engaged in commerce', we are guided by practical considerations".[27]

The court noted that "a practical test of what 'engaged in interstate commerce' means has been evolved in cases

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[24] *Kirschbaum vs Walling*, 316 US at 520.

[25] 318 US 125 (1943).

[26] *Walling vs Jacksonville Paper Co.*, 317 US 564 (1943), *Higgins vs Carr Bros. Co.*, 317 US 572 (1943), both involving employees engaged in handling interstate shipments, in which the court initially recognized that Congress "did not exercise . . . the full scope of the commerce power . . . (and) plainly indicated its purpose to leave local business to the protection of the states", even if that business affected commerce (317 US at 570). In neither of these decisions, however, did the court state the limits of the "in commerce" jurisdiction of the Act.

[27] *Overstreet vs North Shore Corporation*, 318 US at 128.

arising under the Federal Employers' Liability Act", and held that "that practical test should govern here".[28]

The "practical test" had been stated in *Pedersen vs Delaware, Lackawanna & Western RR* to be whether the work "is so closely related to interstate commerce as to be in practice and in legal contemplation a part of it".[29]

In the *Overstreet* case, the court conceded that "the Federal Employers' Liability Act and the Fair Labor Standards Act are not strictly analogous", but saw "no persuasive reason why the scope of employed or engaged 'in commerce' laid down in the *Pedersen* and related cases . should not be applied to the similar language in the Fair Labor Standards Act, especially when Congress, in adopting the phrase 'engaged in commerce', had those Federal Employers' Liability Act cases brought to its attention".

Applying those principles to the case before it, with specific special reliance on the *Pedersen* decision, the court held that employees of the owner of a toll road and drawbridge which formed part of an interstate highway and spanned an interstate waterway, who operated the draw, maintained and repaired the road and bridge, and sold and collected toll tickets, were so closely related to the functioning of the road and bridge as an existing artery of interstate commerce, that they were in practice and in law a part of it.[30]

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[28] Id. at 128-29.

[29] 229 US 146, 151 (1913).

[30] *Overstreet vs North Shore Corporation*, 318 US at 131-32. On the authority of this decision, the court granted certiorari and reversed *Pedersen vs Fitzgerald Co.*, 318 US 740, 742 (1943), in which a New York court had held the Wage and Hour Law inapplicable to employees engaged in repair of interstate facilities. 262 App. Div. 665; 288 NY 687. This case again reached this court on certiorari to review the proceedings subsequent to the first reversal and remand (324 US 720, fn. 53, *supra*).

In *McLeod vs Threlkeld,* the court reaffirmed the adoption of this "practical test", and specifically declined to extend its interpretation of "engaged in commerce" under the Fair Labor Standards Act, to coincide with the extended coverage of the Federal Employers' Liability Act under the 1939 amendment thereto.[31]

The *Pedersen* case, in which the test of coverage had initially been developed, involved an employee of an interstate railroad, "employed . . . in the alteration and repair of some of its bridges and tracks", who, at the time of his injury, was handling materials for use in effecting repairs to a bridge then in use.[32]

This court held that "tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars", and expressed its "opinion that keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it."[33]

However, in that case the court was particularly careful to point out that "of course, we are not here con-

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[31] 319 US 491 (1943). The amendment extended this act to cover not only employees "engaged in commerce", but also to cover those employees "any part of whose duties . . . shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or *closely and substantially,* affect such commerce" (italics added). Act of August 11, 1939, 53 Stat. 1404 (45 USC 51). The language of this amendment was patterned on the language of the opinion of this court in *Labor Board vs Jones & Laughlin,* 301 US 1, 37 (1937): "Although activities may be intrastate in character when separately considered, if they have such a *close and substantial* relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control" (italics added).

[32] 229 US at 150.

[33] *Id.* at 151.

cerned with the construction of tracks, bridges, engines or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such".[34] In a subsequent decision, the court had occasion to meet the issue as to initial construction, which it had not squarely resolved in the *Pedersen* case.

In *Raymond vs Chicago, M. & St. P. Ry. Co.*,[35] the railroad, an interstate carrier, was engaged in constructing a tunnel, over two miles in length, for the purpose of "shortening its main line and making more efficient and expeditious its freight and passenger service". One of its employees was injured in the construction of the tunnel, and filed suit under the Federal Employers' Liability Act. At the time of the injury, the tunnel was not completed, and was not connected with the main line of the railroad.

The Court of Appeals for the Ninth Circuit had held that the employee "was engaged in constructing a new instrumentality. When completed it was intended to be used in interstate commerce, but as yet it was no part of the railroad line . . . and it had not become an instrumentality in interstate commerce". Quoting the language of this court in the *Pedersen* case, the Court of Appeals held that the employee was not "engaged in commerce" when injured.[36]

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[34] *Id.* at 152.
[35] 243 US 43 (1917).
[36] 233 Fed. 239 (CA 9-1916).

This court affirmed the decision of the Court of Appeals, and held that "it is certain . . . that . . . Raymond and the Railroad Company were not engaged in interstate commerce at the time the injuries were suffered".[37]

On the same day on which the *Raymond* opinion was handed down, this court held in *New York Central RR Co. vs White,* also concerned with the Federal Employers' Liability Act, that "a night watchman, charged with the duty of guarding tools and materials intended to be used in the construction of a new station and new tracks upon a line of interstate railroad was . . . not engaged in interstate commerce".

The court specifically pointed out that "the admitted fact that the new station and tracks were designed for use, when finished, in interstate commerce does not bring the case within the federal act".[38]

The "new construction" doctrine of the *Raymond* and *White* cases, evolved under the "practical test" of the *Pedersen* case, has since been adopted in, and applied to, suits arising under the Fair Labor Standards Act, by this court,[39] and by the Courts of Appeals for the First,[40]

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[37] 243 US at 45.

[38] 243 US 188, 191-92 (1917). The court cited both the *Pedersen* and *Raymond* cases as authority.

[39] *Reed vs Murphey,* 168 F2d 257 (CA 5-1948), rev'd on other grounds, but expressly affirmed on this point, 335 US 865 (1948). Construction of a naval training camp and depot.

[40] *Nieves vs Standard Dredging Corp.,* 152 F2d 719 (CA 1-1945). Dredging of navigation channels in previously non-navigable waters for naval base.

Second,[41] Third,[42] Fifth,[43] Sixth,[44] Eighth,[45] and Tenth[46] Circuits.

In each of these cases, in many of which petitioner in the case at bar appeared as *amicus curiae*, the argument for coverage under the Act was predicated on the same "repair and improvement doctrine" of the *Pedersen* and *Overstreet* cases which petitioner advances at bar.

In each case, however, the court carefully observed "the factual distinction between work on new construction deemed outside the channels of interstate commerce,[47] and repair, reconstruction, improvement or addition to an existing interstate facility deemed within the channels of interstate commerce".[48]

Similarly, decisions which have applied the "repair and improvement" doctrine enunciated in the *Pedersen* case,

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[41] *Scholl vs McWilliams Dredging Co.*, 169 F2d 729 (CA 2-1948). Construction of air base at Greenland.

[42] *Kelly vs Ford, Bacon & Davis, Inc.*, 162 F2d 555 (CA 3-1947). Construction of aircraft engine plant.

[43] The instant case, and *Van Klaveren vs Killian-House Co.*, 210 F2d 510 (CA 5-1954). Construction of expressway for ultimate use as interstate highway.

[44] *Koepfle vs Garavaglia*, 200 F2d 191 (CA 6-1952). Construction of expressway for ultimate use as interstate highway.

[45] *Crabb vs Weldon Bros.*, 164 F2d 797 (CA 8-1947). Construction of Alcan Highway.

[46] *Moss vs Gillioz Constr. Co.*, 206 F2d 819 (CA 10-1953). Construction of bridge which was to become a part of a new by-pass route for an interstate highway. The question has not been presented for decision in the Seventh Circuit. In the Fourth Circuit, validity of the doctrine has been recognized expressly, although held inapplicable to the case for decision. *Bennett vs Loftis Co.*, 167 F2d 286, 290 (CA 4-1948). A similar result obtained in the Ninth Circuit in *Ritch vs Puget Sound Bridge & Dredging Co.*, 156 F2d 334 (CA 9-1946).

[47] Such work "merely affects commerce". *Nieves vs Standard Dredging Corporation*, 152 F2d 719, 721 (CA 1-1945).

[48] *Moss vs Gillioz Constr. Co.*, 206 F2d 819, 821 (CA 10-1953).

and adopted in the *Overstreet* case, have invariably been limited carefully, as was the *Pedersen* decision, to preserve the integrity of the "new construction" doctrine of the *Raymond* and *White* cases.[49]

Thus, in *Walling vs Patton-Tulley Transp. Co.*,[50] the court simply noted that "the reasoning that construction upon a highway not yet utilized for interstate commerce is not work in interstate commerce does not apply", because the purpose of the work involved in that case was "to direct and channelize the current of the river" in an existing channel "to prevent erosion and to maintain the minimum depth required by commercial navigation".

Tobin vs Pennington-Winter Constr. Co.,[51] on which petitioner specially relies, involved the construction of a dam, one of the principal functions of which was to control the depth and flow of water in the existing navigable channel of the Arkansas River. The court concluded that construction of the dam was improvement of the Arkansas River as an existing interstate waterway as in the *Patton-Tulley* case, rather than the creation of a new instrumentality as in the *Nieves* case.[52]

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[49] *Fitzgerald Co. vs Pedersen*, 324 US 720, 725 (1945); *Bennett vs Loftis Co.*, 167 F2d 286, 290 (CA 4-1948); *Walling vs McCrady Const. Co.*, 156 F2d 932, 936 (CA 3-1946); *Ritch vs Puget Sound Bridge & Dredging Co.*, 156 F2d 334, 336 (CA 9-1946); *Walling vs Patton-Tulley Transp. Co.*, 134 F2d 945, 947 (CA 6-1943); *Cuascut vs Standard Dredging Corporation*, 94 FS 197, 203 (DC Puerto Rico-1950).

[50] 134 F2d 945, 947 (CA 6-1943). See *Koepfle vs Garavaglia*, 200 F2d 191 (CA 6-1952).

[51] 198 F2d 334 (CA 10-1952), cert. den., 345 US 915.

[52] The court certainly did not reject the "new construction" doctrine, for in the later *Moss* case, it applied that doctrine and drew the factual distinction between "new" construction and "repair and improvement". 206 F2d at 821 (1953).

Petitioner also cites *Fitzgerald Co. vs Pedersen,*[53] asserting that that case involved "employees on a railroad bridge project engaged in constructing 'entirely new abutments' ".[54]

Actually, in the *Fitzgerald* case, this court quoted a stipulation by the parties themselves, to the effect that the employees were "engaged in general construction work, for the construction of entirely new abutments under the two bridges where the abutments had been washed out and destroyed, as aforesaid, and for repairing the substructures of the other two bridges which had been damaged as aforesaid".[55]

The court then held that this "stipulation of facts would not seem to embrace activities not essential and a part of the main work of repair" of an existing instrumentality of interstate commerce; and the court concluded squarely that "since the uncontested facts in the record are to the effect that the respondents were actually engaged in repairing the abutments and substructure, the judgment of the state court must be sustained in this respect".[56]

Analysis

Petitioner's brief rests on two primary bases: (1) an allegation of conflict between the instant decision on the

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[53] 324 US 720 (1945). This case first reached the court in 1943 as *Pedersen vs Fitzgerald Co.*, when a state court decision was reversed on certiorari and remanded for further proceedings (318 US 740, 742, fn. 30 *supra*).

[54] Petition for certiorari, p. 18; brief p. 15.

[55] 324 US 720, 722.

[56] *Id.*, at 725. Since, as petitioner points out, "the 'new construction' argument was vigorously pressed by the employer" (petition for certiorari, p. 18, brief, p. 15 footnote), this careful limiting of the scope of the decision is particularly significant.

one hand, and decisions of the Sixth,[57] Ninth[58] and Tenth[59] Circuits on the other; and (2) a broad attack on the applicability of the "new construction doctrine" in cases arising under the Fair Labor Standards Act, particularly as applied to initial construction of instrumentalities such as highways and waterways, intended for use in interstate commerce.

The foregoing statement of the legislative and judicial history of the Act, shows that there is no conflict in principle or otherwise between the decision below and the cited decisions from other circuits. As has been pointed out, the Courts of Appeals for the Sixth and Tenth Circuits, in other decisions, have expressly recognized the validity of the "new construction doctrine" in wage-and-hour cases.[60]

In the decisions cited by petitioner as being in conflict with that below, those courts simply found, on the factual situations there presented, that new construction was not involved. In the present case, the Court of Appeals for the Fifth Circuit has found, on the different factual situation here presented, that new construction is involved.[61]

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[57] *Walling vs Patton-Tulley Transp. Co.*, 134 F2d 945 (CA 6-1943).

[58] *Ritch vs Puget Sound Bridge & Dredging Co.*, 156 F2d 334 (CA 9-1946).

[59] *Tobin vs Pennington-Winter Constr. Co.*, 198 F2d 334 (CA 10-1952), cert. den., 345 US 915.

[60] *Koepfle vs Garavaglia*, 200 F2d 191 (CA 6-1952); *Moss vs Gillioz Constr. Co.*, 206 F2d 819 (CA 10-1953). The Court of Appeals for the Ninth Circuit, in the *Ritch* case, expressly recognized the doctrine, but held it to be inapplicable to the facts of that case. As pointed out above (pp. 11, 12, fns. 39-46), the doctrine has been recognized by this court, and all of the Courts of Appeals except that for the Seventh Circuit, which has not had the question presented for decision.

[61] A similar distinction was expressly drawn in *Moss vs Gillioz Constr. Co.*, 206 F2d at 821 (CA 10-1953): "These cases (*Pennington-Winter, Patton-Tulley* and *Ritch*) serve only to illustrate the factual distinction between work on new construction deemed outside the channels of interstate commerce, and repair, reconstruction, improvement or addition to an existing interstate facility deemed within the channels of interstate commerce."

Decision of this case must accordingly turn on the court's determination as to the soundness of the cited holdings that employees engaged in initial construction of a new facility, which on completion is destined for use in interstate commerce, are not "engaged in commerce" within the meaning of that term in the subject Act.

The basis of petitioner's attack on the doctrine of these holdings, which he characterizes as a "narrow . . . artificial" doctrine, is that it violates the " 'national' concept of commerce which (the statute) embraces" and defeats the "broad national purposes" of the Act.[62]

Contrary to the expressed intent of Congress and to previous holdings of this court, petitioner would exclude from the scope of the Fair Labor Standards Act, as to employment "in commerce", only "peculiarly 'local' . . . projects" which are " 'historic functions of the individual states' (and) which practical considerations would place beyond the broad scope of commerce contemplated by the Act".[63]

Petitioner would apparently consider "national" in character any project comprehended within the commerce power, or authorized by Congress and "financed wholly or in large part by federal funds".[64]

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[62] Petition for certiorari, pp. 16, 21.

[63] *Id.* at 17.

[64] *Id.* at 17: "The peculiarly national character of both road and waterway construction is also significantly evidenced by the fact that they have long been financed wholly or in large part by federal funds." These latter suggestions (footnotes 62, 63, 64) have not been brought over from petitioner's application for certiorari into his brief. Petitioner continues, however, to aver that the project was authorized by Congress pursuant to its power over commerce (brief, pp. 3, 4) and that the work is "peculiarly 'national' in character" (brief, pp. 10, 15, 16).

As a result of such argument in the *Pennington-Winter* case[65] and in *Tobin vs Hughes Construction Company,*[66] the courts employed language which, if made the basis for decision of cases under the Act, might completely emasculate the judicially defined limits of the Act, and extend the statute "throughout the farthest reaches" of commerce in the constitutional sense, rather than commerce as comprehended by the Act.[67]

In the *Pennington-Winter* case, the opinion stated that since the broad Congressional purpose underlying the flood-control program in the Mississippi River and its tributaries was the improvement of navigation as well as flood-control, it necessarily followed that work authorized by Congress under that legislation was affected with that purpose because each project was "not to be considered as a separate construction . . . (but) as items of a single project undertaken to effectuate such purposes".[68]

Such broad language prompted a vigorous dissent by Judge Murrah, who felt that it might well be construed as tantamount to a frank holding "that because Congress is constitutionally empowered to construct such projects, the Wage and Hour Act *ipso facto* covers all those employees engaged in such activities", a construction expressly repudiated by this court.[69]

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[65] *Tobin vs Pennington-Winter Const. Co., Inc.*, 198 F2d 334 (CA 10-1952), cert. den., 345 US 915.

[66] 205 F2d 606 (CA 5-1953), cert. den., 346 US 925.

[67] In neither case was the language in question necessary to the decision, which, on factual distinctions affirmed in later decisions of the same courts, can be harmonized, as to result, with decisions of this court and of the other courts of appeal.

[68] 198 F2d at 337. The court cited cases dealing with the constitutional scope of the commerce power. *United States vs Appalachian Power Co.*, 311 US 377 (1940), *Oklahoma vs Atkinson Co.*, 313 US 508 (1941).

[69] *Id.* at 337-38.

In the *Hughes* case, with the *Pennington-Winter* decision before it, the Court of Appeals for the Fifth Circuit held (on the face of its opinion, at least) that every employee engaged in work of any character "pursuant to a comprehensive Congressional plan for the control" of the Mississippi River, is subject to the Fair Labor Standards Act.[70]

These pronouncements, and petitioner's argument at bar, necessarily involve categorical disregard of this court's holdings that "the application of the Act depends upon the character of the employee's activities", not on the overall nature of the work on which his employer is engaged,[71] and that the Act does not extend to employment which merely affects commerce, but only to that "in" commerce.[72]

Petitioner's contentions therefore require this court to re-examine its prior holdings as to the scope of the term "engaged in commerce" under the Act.

In so doing, it is appropriate to consider the course which judicial decisions have taken under those holdings, and whether or not such decisions have effectuated the purposes of the Act.

It is also pertinent to inquire as to the reaction of Congress to the interpretations placed on the Act by the courts.

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[70] *Tobin vs Hughes Construction Company*, 205 F2d 606, reh'g den. 206 F2d 505, cert. den. 346 US 925. As in the *Pennington-Winter* case, this decision can be harmonized, on factual distinctions, with the *Van Klaveren* case and the instant case, both later decided by the same court.

[71] *Overstreet vs North Shore Corp.*, 318 US 125, 132 (1943).

[72] *Supra*, pp. 5-6.

Respondent submits that the foregoing survey of decisions of federal courts construing the extent of coverage of the Act as to the term "in commerce" reveals that the "practical test" adopted by this court in the *Overstreet* case has been applied uniformly with satisfactory, harmonious results.

Since Congress intended that each case, or category of cases, should be decided with reference to its particular facts, it was inevitable that some apparent conflict should arise. But this apparent conflict results only from the occasional drawing by the courts of different factual conclusions in what would seem to be similar cases. This possibility cannot be averted as long as the "independent responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of industrial situations" still rests with the courts.[73]

Despite these factual distinctions, which petitioner claims have produced "anomalous results", the federal appellate courts have, without exception, had no difficulty in applying the decisions of this court delineating the extent of commerce under the Act.

Even in those cases which have presented the closest factual distinctions, the courts have expressly acknowledged the two competing lines of decision—"repair and improvement" on the one hand, "new construction" on the other; have found them to be completely harmonious with each other and workable in application; and have

[73] *Kirschbaum vs Walling*, 316 US at 523.

accordingly applied the rule which, in the court's opinion, better fitted the facts of the case presented.[74]

By this process, those activities which merely affect commerce, such as initial construction, which always has been considered inherently local in nature, have been excluded; but all activities which are in the realistic sense "a part of" the commerce involved, such as repair and maintenance of facilities used in carrying on commerce, have been included in such coverage.

Respondent submits that the judicious application by the courts of the two complementary doctrines, both developed under this court's stated "practical test", has accurately measured Congressional intention as to the scope which the coverage of those "engaged in commerce" was to have.

Proof of this conclusion is the fact that Congress has never seen fit to change the statute with respect to that coverage;[75] although amendments have altered other features of the Act, including its jurisdictional standard relating to "production of goods for commerce".[76]

Prior to the subject amendment, the only requirement under that jurisdictional standard was that the employ-

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[74] Compare *Patton-Tully* with *Koepfle*, *Pennington-Winter* with *Moss*, and see *Van Klaveren* and the opinion of the district court in the instant case.

[75] The 1949 amendments did expand the definition of "commerce" to include incoming, as well as outgoing foreign commerce, with the purpose of placing "employees of importers on an equal footing with employees of exporters". *Statement of House Conferees, House Report No. 1453, 81st Cong. 1st Sess.*, pp. 13-14. This change is not material to the point under discussion.

[76] 63 Stat. 911 (1949), 29 USC 203(j).

ment be in a "process or occupation necessary" to the production of goods for interstate commerce.

Since the requirement as to being "engaged in commerce" was not part of that segment of the Act, the courts ultimately had included in its scope almost all employees whose work affected the production of goods for commerce.

Impelled by the conviction that the courts, in such interpretative decisions, had extended the coverage of the Act far beyond its intended scope, Congress amended the law to require, for coverage under the "production" clause, that the employee be engaged in a "closely related process or occupation directly essential" to such production.[77]

It is reasonable to assume, since there was considerable unavailing agitation for amendments further extending the Act, that Congress would have expressed itself had it not been satisfied with the judicial development of the scope of the "in commerce" clause of the Act, including adoption of the "new construction doctrine".[78]

Petitioner's case is accordingly reduced to the argument that this court should now repudiate its basic holdings which delineate the scope of the "in commerce" coverage of the Act and establish the criterion for determining such coverage, although they have served as a satisfactory basis for decision for over a decade.

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[77] *Statement of House Conferees, House Report No. 1453, 81st Cong. 1st Sess.*, pp. 14-15. It is to be noted that the limiting language "closely related" is the same language used by this court in the *Pedersen* case in announcing the limits of the "in commerce" clause.

[78] The original House Bill, No. 3190, to amend the Fair Labor Standards Act, proposed a general extension of coverage, both as to employees "in commerce" and "in the production of goods for commerce", but this bill was rejected. See *House Report No. 267, 81st Cong., 1st Sess.*

Petitioner further urges the court, despite Congressional acceptance of these holdings, to overrule the unanimous opinions of the federal courts of appeal, based on these holdings, that workers engaged in initial construction of new facilities destined for ultimate use in interstate commerce are not engaged "in commerce".

As a substitute for these accepted principles, petitioner asks the court to hold that all workers on "nationally important" projects, or on projects of a "national character", are "engaged in commerce" within the meaning of the Fair Labor Standards Act.

A "practical test" offered by petitioner is whether the work has been authorized by Congress or is financed "wholly or in large part" by federal funds.

Petitioner's position finds no doctrinal support in prior decisions of this court or of the courts of appeal, and is directly opposed to the stated intention of Congress with respect to the application of the Act.

CONCLUSION

The Fair Labor Standards Act was not intended by Congress to extend to all employees in interstate commerce within the Congressional power over that commerce, but was purposely restricted to those engaged in the movement of commerce.

This court, in response to the announced purpose of Congress that it should determine the extent of the cov-

erage of the Act over employees "engaged in commerce", has held that the test was not whether the activities of the employee affected commerce—a jurisdictional standard repudiated by Congress—but was whether such activities were actually "in" or "so closely related . . . as to be in practice and in legal contemplation a part of" interstate commerce; and has referred to its own decisions under the Federal Employers' Liability Act as furnishing sound bases for decisions as to the intended scope of the Fair Labor Standards Act.

Applying these tests, and pursuant to a specific holding by this court under the Federal Employers' Liability Act, every federal court of appeals which has considered the question has held expressly, or has recognized unequivocally, that employees whose activities are in the initial construction of new facilities not yet used in interstate commerce, although actually intended for such ultimate use, are not "engaged in commerce" within the purview of the Fair Labor Standards Act.

Congress has not seen fit to amend the Act to repudiate or alter the doctrine of these decisions, although it has amended the Act in respect to its other phase of coverage to eliminate employees which the courts had included, and which Congress had not intended should be, within the Act.

The argument of petitioner that the doctrine of these cases, which formed the basis for the decision under review, is "plainly inconsistent with the basic principles" of the Act, and has "led to incongruous results", is accordingly specious.

It is therefore respectfully submitted that the employees here involved, who were engaged in initial construction of a lock for a proposed new canal, which, when and if completed and connected to existing navigable interstate waterways, will become a new navigable waterway in interstate commerce, were not "engaged in commerce" within the purview of the Fair Labor Standards Act; and that the decision under review is accordingly correct and should be affirmed.

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February, 1955

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October Term, 1954

No. 387

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Petitioner

versus

C. W. VOLLMER & CO., INC.
Respondent

On Certiorari to the United States Court of Appeals for the Fifth Circuit

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SUPPLEMENTAL BRIEF FOR RESPONDENT

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SUPPLEMENTAL BRIEF FOR RESPONDENT

May it Please the Court:

In argument, respondent called the attention of the court to the inconsistency of Secretary Mitchell's position before this court in respect to the validity of the "new construction doctrine", with his public position on the subject, by which competitive bidders on public projects should have a right to be guided.

An integral part of the Secretary's argument before this court is his contention that the "new construction doctrine" has no place at all in the application of the Fair Labor Standards Act.[1]

At about the same time that he filed his brief here, arguing that work in new construction (of airports, for example) is covered under the Fair Labor Standards Act, Secretary Mitchell held a press conference, at which he was questioned as to the purport of a statement in the President's message on the State of the Union, referring to proposed revision of "8-hour laws applicable to Federal contractors".

The Secretary replied:

> "At the present time, under the law, contractors on Government projects may work their people, as some of them are, 56 hours a week on straight time and be within the present law. . . . Our revisions will make it mandatory that contractors on Government projects pay overtime over 8 hours a day or 40 hours a week."
>
> * * *
>
> *Question:* "Aren't those people also subject to the Fair Labor Standards Act?"
>
> *Secretary Mitchell:* ". . . On new projects they are not. They are when they are working on alterations or repairs of existing structures. That's the difference. But on these new, big airfield projects, for example . . . they are not subject to the Fair Labor Standards Act."

[1] Petitioner's brief, pp. 21-22.

Just prior to argument herein, the proposed legislation discussed by Secretary Mitchell was introduced in the Senate [2] and in the House of Representatives.[3] The bills were referred to committee and have not as yet been reported.

Respondent respectfully submits again that if the ruling which the Secretary here seeks is to be made, it should properly come from the Congress; and that the decision under review should be affirmed.

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RENÉ H. HIMEL, JR.
Of Counsel

March, 1955.

[2] Senate Bill 1204. See also S. 1285.
[3] H. R. 4566.

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MEMORANDUM BY RESPONDENT ON WHETHER CASE HAS BECOME MOOT

May It Please The Court:

In response to the court's order of May 9, 1955, repondent submits this memorandum directed to the question as to whether this case has become moot.

Although the suit was filed while respondent was still engaged in the contract work at issue, the work was completed several months before the trial in the district court.

Under somewhat similar circumstances, this court has held cases to be moot. See *United States vs W. T. Grant Co.*, 345 US 629 (1953); *Commercial Cable Co. vs Burleson*, 250 US 360 (1919).

On the other hand, special considerations point to a contrary conclusion in wage and hour cases generally, and in cases of the type here involved particularly.

Thus, in *Walling vs Helmerich & Payne*, 232 US 37, 43 (1944), a plea that the wage practice in controversy had been terminated before trial, and that the case had accordingly become moot, was denied by this court on the ground that "respondent has consistently urged the validity of the split-day plan and would presumably be free to resume the use of this illegal plan were not some effective restraint made. It is thus 'an actual controversy, and adverse interests' . . . with a 'subject matter on which the judgment of the court can operate' ".

Similarly, respondent continues to urge in the case at bar, that construction activities on "new work" are not within the scope of the Fair Labor Standards Act, and that any effort to bring such work within that scope should be addressed to Congress and not to this court. Respondent has accordingly not urged, at any stage of this proceeding, that the instant case has become moot. *Cf. United States vs W. T. Grant Co., supra*, at 632-33.

Any case under the Fair Labor Standards Act which reaches this court necessarily involves an important question of wide application. As stated in the petition for certiorari herein (pp. 9, 14), to which no opposition was filed, "the question presented is . . . not only of importance to the thousands of employees engaged in similar water-way projects throughout the country, but also to the thousands of employees engaged in interstate highway construction projects".

In each case involving construction contracts let by competitive bidding, as in the case at bar, the main practical significance of the decision is not the determination whether the employer has complied with the Fair Labor Standards Act under the past circumstances actually presented.

The real function of such a decision is to determine the legal question presented for the benefit of the Department of Labor in the overall administration of the Act, and of the employer and others similarly situated for guidance in estimating costs when bidding competitively on other similar contracts.

In view of the relatively short duration of such construction contracts, a holding that completion of the contract renders moot an action by the Secretary of Labor for injunctive relief under the Fair Labor Standards Act, would effectively avoid decision of the substantive issue in practically all such cases.

The relief sought by petitioner in the original proceeding was by injunction to operate, as does all injunctive relief, prospectively. The Secretary of Labor will unquestionably contend, if granted the relief sought, that the decree should operate against future contracts.

Such a decree was actually entered in *Mitchell vs Hughes Construction Company,* Civil Action 3167, Western District of Louisiana, in which the Court of Appeals for the Fifth Circuit had held: "We do not regard this case as moot". 205 F2d 606, 607 *(sub. nom. Tobin vs Ramey),* cert. den., 346 US 925. See also *McComb vs Jacksonville Paper Co.,* 336 US 187, 192 (1949).

Without conceding the validity of such a decree, it is respondent's position, as already pointed out, that it should have a definitive ruling as to the correctness of its interpretation of the Act, for guidance in estimating costs when bidding competitively on future contracts.

It is accordingly respectfully submitted that while, under some of the cited precedents, the instant case may have become moot, the better view is that it has not; and, in any event, the important substantive issue which the case involves should be determined by this court.

EBERHARD P. DEUTSCH
Attorney for Respondent

May 10, 1955

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. 478.

OBEAR-NESTER GLASS CO.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

and

PETITION FOR REHEARING.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. 478.

OBEAR-NESTER GLASS CO.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING.

Comes now the petitioner in the above-entitled cause, by its counsel, and respectfully prays for leave to file Motion for Rehearing of its Petition for Writ of Certiorari heretofore on December 13, 1954, filed in this Court. In support of said motion, petitioner shows the Court that:

1. On December 13, 1954, the petitioner filed in this Court a Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

2. At the time said petition was filed, this Court had already issued its Writ of Certiorari to the United States Court of Appeals for the Third Circuit in the cases of **Commissioner of Internal Revenue v. Glenshaw Glass Company** and **Commissioner of Internal Revenue v. William Goldman Theatres, Inc.** Said cases involve the same issue of law as is involved in the above-entitled case, and respondent

did not oppose the granting of the Petition for Certiorari in this case.

Thereafter, on March 28, 1955, this Court reversed the judgment of the Court of Appeals for the Third Circuit in said cases.

4. Thereafter, on April 4, 1955, this Court denied petitioner's Petition for Certiorari. Petitioner believes that the Court's denial of its Petition for Certiorari was solely in reliance upon and upon authority of the Court's decision in said cases of **Commissioner of Internal Revenue v. Glenshaw Glass Company** and **Commissioner of Internal Revenue v. William Goldman Theatres, Inc.**

Respondents to said
nd William Goldman
their Petition for Re-
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May 9, 1955.

6. The Petition for Certiorari of petitioner ought to be reconsidered for the reasons stated in Petition for Rehearing submitted herewith.

7. Said cases of **Glenshaw Glass Company** and **William Goldman Theatres, Inc.**, were not finally determined until May 9, 1955, and petitioner proceeds promptly thereafter to make this motion.

Wherefore, petitioner respectfully prays that this Honorable Court grant this motion for leave to file Petition for Rehearing and accept the Petition for Rehearing submitted herewith.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. 478.

OBEAR-NESTER GLASS CO.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REHEARING.

Comes now petitioner, Obear-Nester Glass Co., by its counsel, and respectfully petitions for a rehearing of the decision and judgment of this Court entered April 11, 1955, denying petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit. The grounds urged by petitioner in support of this petition are as follows:

I.

The Court's denial of the writ of certiorari is based solely upon its decision in **Commissioner of Internal Revenue, Petitioner, v. Glenshaw Glass Company, Respondent,** and **Commissioner of Internal Revenue, Petitioner, v. William Goldman Theatres, Inc., Respondent.**

II.

In denying petitioner's petition for the writ of certiorari, the Court passed upon the merits of the case, which ought not to be considered on such a petition. At the time the petition was filed, unimpeachable grounds for the granting of the writ admittedly existed, and the writ should have been granted. In denying the writ, solely upon the basis of a subsequent decision relating to the merits of the case, and not relating to the allegations of the petition for writ of certiorari, the Court determined petitioner's case without hearing petitioner, and deprived petitioner of its right to be heard in its own case which was determined. In case of two conflicting decisions of the Court of Appeals, the writ of certiorari should issue in both cases, and the Court ought not first determine the merits and then deny the writ to the Court which it deems to have rendered a correct decision. That a decision is correct is not and ought not to be a ground for denying certiorari, if it is in conflict with the decision of the Court of Appeals of another Circuit.

The result of the denial of petitioner's petition for certiorari is that the concessions of others are taken as petitioner's concessions. Petitioner, while it concedes that an excise or franchise tax could constitutionally be imposed upon gross receipts of a corporation, including punitive damages, has not conceded that an income tax can be made to include such damages in its measure. The Court's decision makes no distinction between punitive damages received by a corporation and those received by an individual, and apparently none is to be made; but a tax upon an individual as such is a **capitation** or **poll tax,** a direct tax, and such a federal tax must be measured by income. There is, therefore, a constitutional question involved in the determination whether punitive damages are income, although there is no question that Congress could

include in the measure of a corporate franchise tax any receipt or other thing, whether or not income.

Similarly the concession that recoveries are taxable income to the extent that they compensate for damages actually incurred is the concession of others, not of this petitioner, who has not so conceded, but has only omitted to appeal from the decision of the Tax Court to that effect. The materiality of the concession first appeared in the Court's opinion, and the question (for there is a question) whether or not such actual damages are taxable income has never been argued to the Court, and ought not be thus decided without consideration. **Durkee v. Commissioner** (CCA 6, 1947), 162 F. 2d 184; **Anna Levens v. Commissioner** (Tax Court Memo Opinion, Docket No. 27283, Nov. 8, 1951), 10 TCM 1083.

The denial of the writ was therefore contrary to this Court's expressed practice, to grant the writ "where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter." Rule 38, par. 5 (b). While it is recognized that the rule quoted does not control the Court's discretion, that discretion ought not be exercised to deny a writ in case of conflict among the circuits, to refuse to a petitioner the right to be heard in his own case.

III.

Respondent, Commissioner of Internal Revenue, did not oppose the granting of the writ in the above-entitled cause. That both parties thought the writ should issue is convincing reason for the issuance of the writ.

IV.

The decision of the Court in **Commissioner of Internal Revenue v. Glenshaw Glass Company** and **Commissioner of**

Internal Revenue v. William Goldman Theatres, Inc., and its denial of petitioner's Petition for Certiorari, omitted considerations of grave importance in the interpretation and enforcement of the revenue laws, including those set out in this petitioner's Supplement to its Petiton for Certiorari heretofore filed with this Court, and the decision of the Court contains implications not intended by Congress nor foreseen by this Court.

The question presented in this case and the related cases is the meaning of the word "income," as that word is used in the Internal Revenue Code, and the basis of the Court's decision is that all receipts constitutionally taxable are taxable as income. This holding is contrary to the consistent and unquestioned position not only of petitioner, but of respondent over a period of many years, as appears from related practice and rulings.

For instance: Section 901 of the Internal Revenue Code of 1954 allows a credit against United States income tax, of income tax paid to a foreign country, but a tax other than an income tax paid to a foreign country is allowable only as a deduction from income. Thus, the question frequently arises whether a foreign tax imposed by statutes or decrees written in a foreign language is an income tax. In determining whether such a tax, not imposed on income by that word which is unknown in the foreign language, is an income tax, the decision has consistently been reached upon the basis of whether or not the tax is upon income, and the definition of income set out by this Court in **Eisner v. Macomber**, 252 U. S. 189, has been used as the basis of determining whether or not the subject of the particular foreign tax is income. IT 2964, XV-1 CB 138 (1936) cites **Eisner v. Macomber** as the basis of its ruling. See also IT 3924, 1948-2 CB 91; IT 4013, 1950-1 CB 65, IT 3371, 1940-1 CB 103; **Keasbey & Mattison Co. v. Rothensies** (1943), CCA 3, 133 F. 2d 894, Cert. den. 320 U. S.

739. In **Wilson v. Commissioner**, 7 TC 1469 (1946), the Tax Court upheld the Commissioner's assertion that a tax which included in its measure property received by gift was not an income tax.

There have been negotiated recently, and there are now in process of negotiation, numerous treaties with foreign countries relating to taxation, and substantially all of them relate in part at least to taxation of incomes. Their provisions are based upon the accepted concept of income and become uncertain, ambiguous or meaningless when the accepted concept of income is abandoned. The decision of this Court in the related cases hereinafter mentioned, if it be the law, would require reconsideration of the treaties heretofore ratified and revision of the negotiations now being conducted.

V.

The Court in its decision distinguishes **Eisner v. Macomber**, 252 U. S. 189; **Stratton's Independence, Ltd., v. Howbert**, 231 U. S. 399, and **Doyle v. Mitchell Bros. Co.**, 247 U. S. 179, upon a basis which is untenable. It states that the definition of income adopted in **Eisner v. Macomber**, and since then followed, derives from the earlier cases. In truth and in fact, it derives from "the great work of Adam Smith, the first comprehensive treatise on political economy in the English language." (See **Veazie Bank v. Fenno**, 8 Wall. 533, 542, decided in 1869, in the period of the beginning of income taxation in the United States.) Adam Smith's concept of **annual wealth**, that is, income, is the concept of income upon which the income tax laws are based and from which the concept of income derives. The cases cited by the Court **(Eisner v. Macomber, Stratton's Independence, Ltd., v. Howbert**, and **Doyle v. Mitchell Bros.)** are but applications of Adam Smith's generalization of income as, first, gain; second, derived, and third, from a source (as capital and labor).

Wherefore, petitioner respectfully prays that a rehearing be granted, and that upon such rehearing its Petition for Writ of Certiorari be granted.

Respectfully submitted,

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